INDIAN CLAIMS COMMISSION PROCEEDINGS

(1998) 9 ICCP

Reports

Eel River Bar First Nation Inquiry
Eel River Dam Claim

Qu'Appelle Valley Indian Development Authority Inquiry
Flooding Claim
Muscowpetung First Nation Sakimay First Nation
Pasqua First Nation Cowessess First Nation
Standing Buffalo First Nation Ochapowace First Nation

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INDIAN CLAIMS COMMISSION PROCEEDINGS

A PUBLICATION OF

THE INDIAN CLAIMS COMMISSION

(1998) 9 ICCP

CO-CHAIRS

Daniel J. Bellegarde
P.E. James Prentice, QC

COMMISSIONERS

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FROM THE CO-CHAIRS

This is the ninth volume of the *Indian Claims Commission Proceedings* to be published and we are pleased to present it on behalf of the Commissioners and staff of the Indian Claims Commission. This volume includes two inquiry reports of the Commission.

The first of the two reports relates to the inquiry into the Eel River Dam claim of the Eel River Bar First Nation in New Brunswick. The Commission reviewed the Eel River Bar First Nation's specific claim alleging that Canada had breached the First Nation's treaty rights, provisions of the *Indian Act*, and the Crown's fiduciary obligations by allowing the construction of a dam on reserve lands in 1963 which substantially damaged fish and clam habitat and the First Nation's traditional economy based on these harvesting activities.

On February 19, 1998, the Commission released its inquiry report into claims submitted to the Government of Canada in 1986 by the Qu'Appelle Valley Indian Development Agency (QVIDA) requesting compensation for damages to reserve lands caused by flooding. These damages were caused by water control structures constructed by the Prairie Farm Rehabilitation Administration in the early 1940s. The Commission's inquiry dealt with breaches of the Crown's lawful obligations owed to six First Nations in Saskatchewan – Muscowpetung, Pasqua, Standing Buffalo, Sakimay, Cowessess, and Ochapowace. Two other members of QVIDA – the Piapot and Kahkewistahaw First Nations – elected not to participate in the inquiry.

Daniel J. Bellegarde
Co-Chair

P.E. James Prentice, QC
Co-Chair

ABBREVIATIONS

BCCA	British Columbia Court of Appeal
BCR	Band Council Resolution
BCSC	British Columbia Supreme Court
CA	Court of Appeal
CIL	Canadian Industries Limited
CNLR	Canadian Native Law Reporter
CPR	Canadian Patent Reporter
DIAND	Department of Indian Affairs and Northern Development
DLR	Dominion Law Reports
DLS	Dominion Land Surveyor
DREE	Department of Regional Economic Expansion
DSGIA	Deputy Superintendent General of Indian Affairs
Ex. CR	Exchequer Court of Canada Reports
FC	Canada Federal Court Reports
FCA	Federal Court Appeal Division
FCTD	Federal Court Trial Division
FSI	Federation of Saskatchewan Indians
FTR	Federal Trial Reports
HC	Haute Cour
IAB	Indian Affairs Branch
ICC	Indian Claims Commission
ICCP	Indian Claims Commission Proceedings
IR	Indian Reserve
JHA	Journal of the House of Assembly
KB	Court of King's Bench
NA	National Archives of Canada

NBCA	New Brunswick Court of Appeal
NBWA	New Brunswick Water Authority
NRTA	*Natural Resources Transfer Agreement*
NR	National Reporter
NSCA	Nova Scotia Court of Appeal
NSR	Nova Scotia Reports
NWPA	*Navigable Waters Protection Act*
ONC	Office of Native Claims
OR	Ontario Reports
PADPG	Peace-Athabasca Delta Project Group
PFRA	Prairie Farm Rehabilitation Administration
QB	Court of Queen's Bench
QVIDA	Qu'Appelle Valley Indian Development Authority
RCAP	Royal Commission on Aboriginal Peoples
RDH	Red Deer Holdings Ltd
RPR	Real Property Reports
RSBC	Revised Statutes of British Columbia
RSC	Revised Statutes of Canada
RSNB	Revised Statutes of New Brunswick
RSUC	Revised Statutes of Upper Canada
SC	Statutes of Canada
SCC	Supreme Court of Canada
SCR	Canada Supreme Court Reports
SCW	Specific Claims West
SGIA	Superintendent General of Indian Affairs
SNB	Statutes of New Brunswick
TD	Trial Division
WWR	Western Weekly Reports

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INDIAN CLAIMS COMMISSION

EEL RIVER BAR FIRST NATION INQUIRY
EEL RIVER DAM CLAIM

PANEL

Commission Co-Chair Daniel J. Bellegarde
Commissioner Roger J. Augustine
Commissioner Aurélien Gill

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To the Indian Claims Commission
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DECEMBER 1997

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PART I

INTRODUCTION

BACKGROUND TO THE INQUIRY

On February 18, 1987, the Eel River Bar First Nation submitted a specific claim to the Department of Indian Affairs alleging that the Crown had violated the First Nation's treaty and riparian rights, provisions of the *Indian Act*, and its fiduciary obligations as a result of the construction of a dam on its reserve in 1963 and the consequent damages caused to the First Nation's fishery.[1]

Based on a preliminary analysis of the claim submission, Rem Westland, Director, Specific Claims Branch, wrote to Chief Everett Martin on December 29, 1988, stating that the claim "may have little merit." According to its review of the claim, the Department of Indian Affairs found that the Band was fully compensated for the loss incurred by the construction of the dam and that the Band Council consented to and was fully aware of the contents of the agreement signed in 1970. With respect to the Band's objection to the use of the expropriation authority under section 35 of the *Indian Act*, Westland stated that the argument could not be supported because the Band had "not adequately demonstrated that the legal procedures and requirements were not met."[2] On January 25, 1989, Chief Martin wrote to the Specific Claims Branch disputing the findings of the department's preliminary analysis and withdrawing the claim from the Specific Claims process.[3]

The First Nation resubmitted its claim in February 1992. In a letter to Thomas Siddon, Minister of Indian Affairs and Northern Development, on February 20, 1992, Chief Martin summarized the claim, stating:

---

[1] Everett Martin, Chief, Eel River Bar First Nation, Eel River, NB, to D.K. Goodwin, Assistant Deputy Minister, Government of Canada, Department of Indian Affairs, Ottawa, February 18, 1987, DIAND file B 8620-285 (N5), vol. 1 (ICC Documents, p. 628).

[2] Rem Westland, Director, Specific Claims Branch, to Chief Everett Martin, December 29, 1988, DIAND file E-5661-3-06013, vol. 1 (ICC Documents, pp. 654-57).

[3] Everett Martin, Chief, Eel River Bar First Nation, Eel River, NB, to Acting Director, Specific Claims Branch, Department of Indian Affairs, Ottawa, January 25, 1989, DIAND file E-5661-3-06013, vol. 1 (ICC Documents, pp. 658-59).

> We submit, among other things, that the agreements, permits, and orders-in-councils which purport to permit the Province of New Brunswick to occupy, use, and expropriate portions of our reserve for the purposes of establishing the dam and its related works are void and of no force or effect. We submit that we have action in trespass against the Province of New Brunswick for continuing to occupy a portion of our reserve without right or permission. . . . that there is a breach of our fiduciary rights against your department, and that the governments of Canada and New Brunswick have an outstanding lawful obligation from the breach of the treaty of 1779 respecting the destruction of our treaty right to our fishery, from the breaches of the *Indian Act*, the breach of the New Brunswick expropriation laws, which breaches may have allowed for a breach of Section 111 of the *Criminal Code* by one of your former officials, and which resulted in the illegal disposition of our lands.[4]

After the completion of confirming research and consultations with the First Nation and its legal counsel, Beverley A. Lajoie, Research Manager, Specific Claims East/Central, informed Chief Martin that the claim had been assessed and did not disclose an outstanding lawful obligation owed to the First Nation on the part of Canada.[5] On February 14, 1995, the First Nation provided another submission and clarification of evidence to Specific Claims East/Central.[6] On June 16, 1995, Pamela Keating, Research Manager, Specific Claims East/Central, wrote to Chief Martin to advise that the second preliminary legal review of their claim had concluded that "Canada owes no outstanding lawful obligation to the First Nation within the context of the Specific Claims Policy." Ms Keating's letter further suggested that the First Nation had the option of submitting the rejected claim to the Indian Claims Commission for review.[7] Immediately on receiving this response, the First Nation requested funding from the Department of Indian Affairs to conduct a comprehensive loss-of-use study.[8] On September 11, 1995, the Minister of Indian Affairs refused to grant the additional funding on the grounds that the claim had already been rejected twice, in the course of which extensive research had been conducted, but suggested that the First Nation could request an independent assessment of the rejected claim from the Indian Claims Commission.[9]

---

[4] Chief Everett Martin, Eel River Bar First Nation, Eel River, NB, to Thomas Siddon, Minister of Indian Affairs, Ottawa, February 20, 1992 (ICC Documents, pp. 674-75).

[5] Beverley A. Lajoie, Research Manager, Specific Claims East/Central, to Everett Martin, Chief, Eel River Bar First Nation, Eel River, NB, October 6, 1994 (ICC Documents, pp. 719-22).

[6] Chief Martin Everett, Eel River Bar First Nation, Eel River, NB, to Beverley A. Lajoie, Research Manager, Specific Claims East/Central, February 14, 1995 (ICC Documents, p. 723).

[7] Pamela Keating, Research Manager, Specific Claims East/Central, Ottawa, to Chief Everett Martin, Eel River Bar First Nation, June 16, 1995 (ICC Documents, pp. 728-32).

[8] Chief Everett Martin, Eel River Bar First Nation, to Pamela Keating, Research Manager, Specific Claims East, July 20, 1995 (ICC Documents, p. 733).

On September 19, 1995, the First Nation requested that the Indian Claims Commission conduct an inquiry into the rejection of its claim.[10]

MANDATE OF THE INDIAN CLAIMS COMMISSION

The mandate of this Commission is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on "whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where that claim has already been rejected by the Minister . . ."[11] This Policy, outlined in the 1982 booklet entitled *Outstanding Business: A Native Claims Policy – Specific Claims*, states that Canada will accept claims for negotiation where they disclose an outstanding "lawful obligation" on the part of the federal government.[12] The term "lawful obligation" is defined in *Outstanding Business* as follows:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
> ii) A breach of obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
> iv) An illegal disposition of Indian land.

Furthermore, Canada is prepared to consider claims based on the following circumstances:

---

[9] Ronald A. Irwin, Minister of Indian Affairs and Northern Development, Ottawa, to Chief Everett Martin, Eel River Bar First Nation, Dalhousie, NB, September 11, 1995.

[10] Chief Everett Martin, Eel River Bar First Nation, Dalhousie, NB, to Indian Claims Commission, Ottawa, September 19, 1995.

[11] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

[12] DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 ICCP 171-85 (hereinafter *Outstanding Business*).

i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.

The Commission has been asked to inquire into and report on whether the Eel River Bar First Nation has a valid claim for negotiation pursuant to the Specific Claims Policy. This report contains our findings and recommendations on the merits of this claim.

PART II

HISTORICAL BACKGROUND

The historical evidence in relation to the Eel River Bar First Nation's claim, reviewed in this Part, includes several volumes of documentary evidence and the testimony provided by members of the Eel River Bar First Nation at a community session on April 23, 1996. The Commission also received testimony from Wallace LaBillois, who was a councillor and band manager during the events in question during a separate session in Ottawa on July 11, 1996.

The Commission also considered the written submissions of the First Nation and Canada, in addition to hearing oral submissions from legal counsel for the parties on February 20, 1997. The documentary evidence, written submissions, transcripts from the community session and oral submissions, and the balance of the record before the Commission in this inquiry are referenced in Appendix A to this Report.

THE TREATY OF 1779

The ancestors of the Eel River Bar First Nation were parties to the 1779 Treaty of Peace and Friendship (the Treaty of 1779) signed in Windsor, Nova Scotia, on September 22, 1779, by His Majesty's Superintendent of Indian Affairs in Nova Scotia and several tribes of Micmac Indians representing the Miramichi, Pogmosche, Restigouche, and Richebouctou Indians. The Treaty of 1779 was signed in the wake of a series of raids against English inhabitants carried out by Indians at the instigation of disaffected settlers. The treaty was intended to promote peace and bring an end to lawlessness on the east coast around the Baie des Chaleurs in what is now the northeastern part of the province of New Brunswick. The treaty stipulated, in part:

> That we [the Micmacs of Miramichy] will behave Quietly and Peaceably towards all his Majesty King George's good Subjects treating these upon every occasion in an honest friendly and Brotherly manner.

> That we will at the Hazard of our Lives defend and Protect to the utmost of our power, the Traders and Inhabitants and their merchandize and Effects who are or may be settled on the Rivers Bays and Sea Coasts within the forementioned District against all the Enemys of His Majesty King George Whether French, Rebells or Indians.
>
> . . .
>
> In consideration of the true performance of the foregoing Articles, on the part of the Indian Affairs doth hereby Promise in behalf of government:
>
> > That the said Indians and their Constituents shall remain in the Districts before mentioned Quiet and Free from any molestation of any of His Majesty's Troops or other his good Subjects in their Hunting and Fishing.
> >
> > That immediate measures shall be taken to cause Traders to supply them with Ammunition, clothing and other necessary stores in exchange for their Furrs and other Commoditys.[13]

It is generally accepted that the commodities historically traded by the Micmac were fur, moose hides, baskets, and fish.[14]

THE EEL RIVER BAR INDIAN RESERVE

The Eel River Bar Indian Reserve was set aside for the use and benefit of the First Nation by an executive order of the Province of New Brunswick dated February 28, 1807.[15] The size and specific location of the reserve were not entirely clear from the Order in Council; however, the minutes of the executive order offered the following description of the reserve:

> Ordered that the vacant tract of land on Eel River commencing at Lot No. 6 north of the mouth of the Eel River and extending to Lot No. 1 at the extremity of the Sand Beach which forms the entrance of the River – including the Eel Fishery, be reserved for the use of the Indians – with the exception of the Sand Beach formerly reserved for the public fishery.[16]

Three schedules of Indian reserves in New Brunswick for the years 1838, 1842, and 1847 describe the reserve at Eel River Bar as containing 400 acres of land on the north side of Eel River.[17] In 1867 and 1870, however, tables of

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[13] "Treaty Entered into with the Indians of Nova Scotia from Cape Tormentine to the Bay De Chaleurs, 22 Sept. 1779," Claims and Historical Research Centre, DIAND file X-92, pp. 2 and 5 (ICC Documents, pp. 8-9). A copy of the treaty is attached as Appendix B to this report.

[14] L.F.S. Upton, *Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713-1867*(Vancouver: UBC Press, 1979), 18, 63-64, 128-29.

[15] DIAND Indian Land Registry, Instrument No. 014590 (ICC Documents, pp. 14-15).

[16] DIAND Indian Land Registry, Instrument No. 014590 (ICC Documents, p. 15).

[17] "Schedule of Indian Reserves," New Brunswick, *Journal of the House of Assembly* (JHA), Appendix to "Report on Crown Lands" (Fredericton, 1838); DIAND file 271/30-13-3, vol. 1, Surveys and Reserves, Eel River Indian Reserve No. 3, Miramichi Agency (ICC Documents, pp. 17-19).

Indian lands in New Brunswick describe the reserve as containing only 220 acres on the north shore of the river.[18] The First Nation has asserted a claim for an outstanding entitlement based on the discrepancy of 180 acres, but this claim is not before the Commission in this inquiry.

From 1807 onwards, there were numerous additions to, as well as surrenders and partitions of, the Eel River reserve, as follows:

- October 30, 1908: 79.90 acres added to the reserve;[19]
- May 22, 1928: 124.4 acres added to the reserve;[20]
- August 24, 1928: 15 acres added to the reserve;[21]
- February 14, 1929: 3½ acres surrendered by the Band for the New Brunswick International Paper Company pipeline right of way;[22]
- May 19, 1930: 1.7 acres added to the reserve "and also all marine rights and all fishing rights in connection therewith";[23] and
- September 1, 1960: section 28(2) permit granted to the New Brunswick Electric Power Commission for the use of 2.83 acres of reserve land for the electric power transmission line "for such period of time as the said right of way is required for the purpose of an electric power transmission line."[24]

When the construction of a dam on the Eel River was first proposed in 1963, the Eel River reserve contained a total of 434.67 acres of land. After the 1970 letter-permit and expropriation of land for the headpond, the reserve contained a total land base of 368.39 acres. In 1996, Band Councillor Gordon LaBillois described the reserve as 368 acres, a "very small land base" that had been "cut up like a piece of pie" by two major highways, a transmission line, two pipelines, and two roads created as a result of the damming of the Eel River[25] (see map 1 on page 14).

---

[18] Indian Lands in New Brunswick, May 19, 1870, DIAND, file 271/30-13-3, vol. 1 (ICC Documents, pp. 24-25).

[19] DIAND Indian Land Registry, Instrument No. 014592 (ICC Documents, pp. 26-29).

[20] DIAND Indian Land Registry, Instrument No. 014593 (ICC Documents, pp. 30-35).

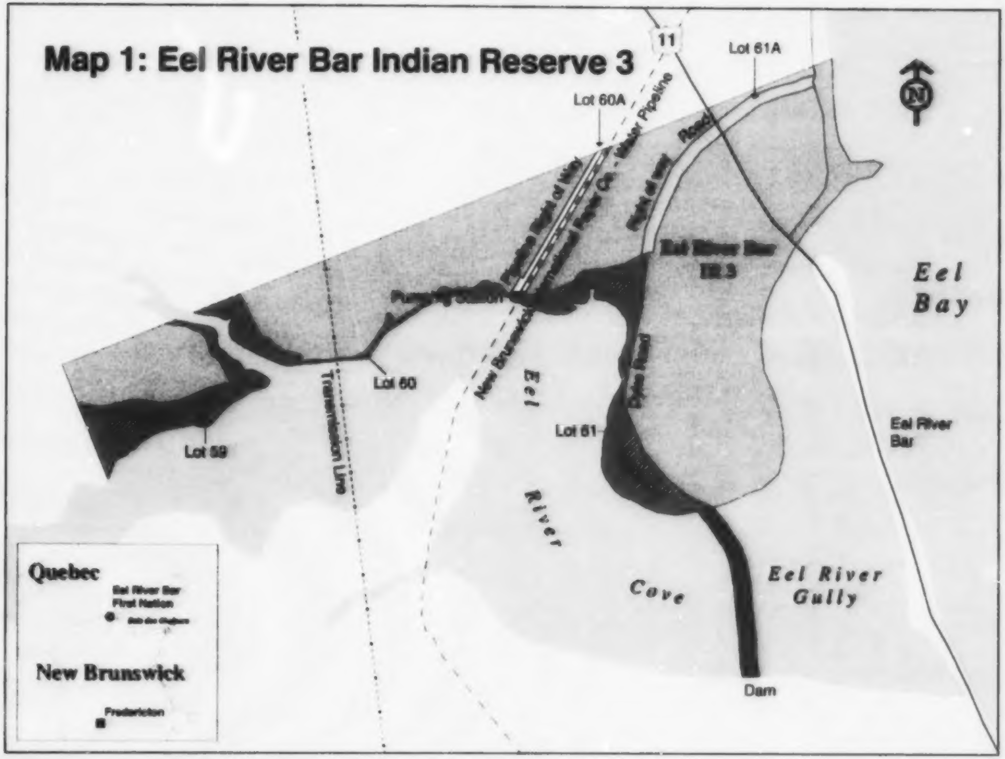
[21] DIAND Indian Land Registry, Instrument No. 014594 (ICC Documents, pp. 36-41).

[22] DIAND Indian Land Registry, Instrument No. 014595 (ICC Documents, pp. 42-47).

[23] DIAND Indian Land Registry, Instrument No. 014599 (ICC Documents, pp. 51-54).

[24] Department of Citizenship and Immigration, Indian Affairs Branch, Agreement between Her Majesty Queen Elizabeth the Second and The New Brunswick Electric Power Commission, September 1, 1960, DIAND file 271/31-3-13-3 (ICC Documents, pp. 95-97).

[25] ICC Transcript, April 23, 1996, pp. 127-28 (Gordon LaBillois).



Map 1: Eel River Bar Indian Reserve 3

11
Lot 61A
Lot 60A
New Brunswick International Paper Co. - Water Pipeline
Pipeline Right of Way
Right of way
Road
Eel River Bar IR 3
Pumping Station
Dyke Road
Eel Bay
Eel River Bar
Lot 60
Lot 61
Lot 59
Eel River Cove
Eel River Gully
Transmission Line
Dam
Quebec
Eel River Bar First Nation
New Brunswick
Fredericton

ADMINISTRATION AND CONTROL OF INDIAN RESERVES IN NEW BRUNSWICK

In 1958, the Government of Canada and the Province of New Brunswick entered into an agreement to clarify jurisdiction over the administration and control of Indian reserve land. Before this agreement was entered into, the federal government had been issuing letters patent under the Great Seal of Canada to convey surrendered reserve lands to private purchasers, on the assumption that it had the authority to do so. The difficulty, however, was that "two decisions of the Judicial Committee of the Privy Council relating to Indian lands in the Province of Ontario and Quebec lead to the conclusion that said lands could only have been lawfully conveyed by authority of New Brunswick with the result that the grantees of said lands hold defective titles and are thereby occasioned hardship and inconvenience."[26]

To resolve any ambiguities over who had jurisdiction with respect to reserve land and surrendered reserve land, the province agreed to transfer all rights and interests in Indian reserves to the federal government. Although this agreement made no reference to aboriginal or treaty hunting and fishing rights, it confirmed all previous land grants, provided for a right of first refusal to the province over lands surrendered for sale, and withheld from the transfer "lands lying under public highways, and minerals."[27]

THE ECONOMY OF THE EEL RIVER BAR RESERVE

The location of the Eel River Bar Reserve at the mouth of the Eel River on the Baie des Chaleurs was a crucial factor in the development of the economy, culture, and traditions of the First Nation. The fishery on the Eel River and in the waters adjacent to the reserve has been the foundation of the First Nation's economy since at least the time when their reserve was set aside. The 1807 provincial Order in Council setting aside the reserve provided that the "Eel Fishery" was reserved for the use of the Indians, indicating the importance of the fishery to the First Nation.[28] Government efforts to secure the river's resources for the First Nation are also evident in the federal Crown's 1930 purchase of a 1.7-acre strip of waterfront, known as "Wallace Beach," which specifically included "all marine rights and all fishing rights in connection therewith" for the benefit of the First Nation.[29] The price paid for this parcel of land was $2200,[30] considerably more than that paid for the adjoining pieces, thereby indicating the economic value of having access to the fishery.

---

[26] *Indian Reserves of New Brunswick*, SC 1959, c. 47 (ICC Documents, p. 78).
[27] *Indian Reserves of New Brunswick*, SC 1959, c. 47 (ICC Documents, pp. 78-79).
[28] DIAND Indian Land Registry, Instrument No. 014590 (ICC Documents, p. 15).
[29] DIAND Indian Land Registry, Instrument No. 014599 (ICC Documents, p. 51).

The value of the fishery was placed in context by Band Councillor Gordon LaBillois, who described the Eel River as having been one of the "richest little rivers" in the area, with the best clam flats in the province:

> The gifts that came from the Eel River were gifts that were handed down to our people here since time immemorial. Through access [to] these resources our people could always fend for themselves. It generated eight months of economic activity. We had our own economic base at Eel River.[31]

At the community session, numerous members of the First Nation told the Commissioners that the Eel River had provided them with eels, codfish, smelt, trout, salmon, herring, bass, wild and brant geese, and ducks.[32] In this small community of fewer than 200 people,[33] the fish harvests were large enough to preserve the excess for off-season consumption, trade for other types of food, and, later on, sale to local markets and tourists.[34]

Furthermore, the fact that this area was not suitable for agricultural development meant that the reserve economy, both subsistence and commercial, centred on the fishery – in particular, the harvesting of clams. In 1938, the Inspector of Indian Agencies had reported that no farming could be expected at this reserve because of the marshy land. A worse place could not have been chosen for a reserve, he noted, the land being essentially worthless.[35] In its Annual Reports between the early 1930s and the 1960s, Indian Affairs repeatedly stated that economic opportunities for Indians throughout the province were dismal because farming operations were limited and hunting and trapping had become scarce. This lack of opportunity for Indians in the area meant that many had to find employment as labourers.[36]

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[30] Secretary, Department of Indian Affairs, to Max D. Cormier, MP, Restigouche-Madawaska, December 18, 1931 (ICC Documents, pp. 56-57).

[31] ICC Transcript, April 23, 1996, pp. 93-96 (Gordon LaBillois).

[32] ICC Transcript, April 23, 1996, pp. 14-15, 42-44 (Margaret LaBillois); pp. 30-32 (Marion LaBillois); p. 56 (Richard Simonson); p. 59 (Hubert LaBillois); pp. 64-66 (Peter Simonson); pp. 68-70 (Earl LaBillois); p. 85 (Alfred Narvie); p. 89 (Leonard LaBillois); p. 97 (Gordon LaBillois); pp. 114-19 (Rebecaa LaBillois).

[33] ICC Transcript, April 23, 1966, p. 51 (Margaret La Billois); pp. 86-87 (Leonard LaBillois).

[34] ICC Transcript, April 23, 1996, pp. 43, 51 (Margaret LaBillois); pp. 86-87 (Leonard LaBillois); pp. 32, 36-38 (Marion LaBillois); p. 66 (Peter Simonson); p. 95 (Gordon LaBillois); p. 119 (Rebecca LaBillois).

[35] Jude Thibault, Inspector of Indian Agencies, to Indian Affairs Branch, Ottawa, September 16, 1938 (ICC Documents, p. 58).

[36] DIAND, Annual Reports for the years 1931 to 1961.

Cottage industries like knitting, snowshoe-making, small-scale trapping, and pulp-log scaling were used to supplement a family's income, but neither the resources nor the markets for these items were large.[57] Further, industry in the nearby town of Dalhousie did not provide employment for many of Eel River's residents, and many families found themselves forced to look for employment in the United States.[58]

The clam harvest was the mainstay of the reserve's economy. Several First Nation members indicated that for most of the year, the clam harvest was the centre of life on the reserve. Clams provided not only daily food and the basis of commercial economy but also a lifestyle that had been practised by many generations of Micmac Indians:

> The clams, of course, the clams were our source of revenue. At that time the welfare was $1 a week for each of us and there were five of us, five children, and my mom and dad. We couldn't make a – there was no living on that. Because I remember quite well the clams were our subsistence, because we had clam pie, we had clam chowder, we had clams as they were and we had clam sandwiches. You know, that's what we were brought up on, clams.[59]

In addition to using the clams to feed their families, First Nation members sold clams, together with other food, to tourists from beach canteens and roadside stands.[40]

INITIAL PROPOSAL TO CONSTRUCT THE DAM ON THE EEL RIVER (1962)

In early 1962, the New Brunswick Water Authority (NBWA) contacted the Indian Affairs Branch (IAB) of the Department of Citizenship and Immigration to discuss the possible damming of the Eel River and its potential impact on the First Nation.

On February 27, 1962, the Maritime Regional Supervisor of Indian Affairs, F.B. McKinnon, sent a memorandum to David Vogt, Acting Chief of Resources and Trusts for the IAB in Ottawa, informing him of a discussion he had had with Dr John S. Bates, Chairman of the NBWA, who indicated that the Town of Dalhousie was interested in constructing a dam on the Eel River to secure a supply of fresh water to attract industry. At this initial stage, the NBWA had not yet decided on how to provide the water supply, and test drilling for water continued while options for construction of a dam were considered. The NBWA initially proposed that the dam be located at the mouth of the Eel River, adjacent to the reserve, where there was already a bridge to accommodate Highway 11. Since the proposal involved tidal water and was off reserve, McKinnon thought there was not much Indian Affairs could do to prevent the dam from being constructed on the Eel River; however, he expressed concern with the fact that "erection of a dam will mean the flooding of a fairly large flat which at the moment provides approximately 50% of the [Band's] clam production. It is therefore quite valuable to the Indians."[41] McKinnon suggested that any adverse effects of the dam on the Band's livelihood "should be kept very much in mind when discussing alternate means for providing water for the Town of Dalhousie."[42]

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[57] ICC Transcript, April 23, 1996, pp. 32, 35 (Marion LaBillois); p. 116 (Rebecca LaBillois).

[58] ICC Transcript, April 23, 1996, p. 17 (Margaret LaBillois); p. 81 (Alfred Narvie); pp. 26, 38 (Marion LaBillois); p. 56 (Richard Simpson); p. 59 (Hubert LaBillois); p. 75 (Mary McBain); p. 87 (Alfred Narvie); p. 88 (Leonard LaBillois); p. 91 (Gordon LaBillois).

[59] ICC Transcript, April 23, 1997, p. 14 (Margaret LaBillois).

[40] ICC Transcript, April 23, 1996, p. 47 (Margaret LaBillois); p. 118 (Rebecca LaBillois).

Dr Bates wrote to Vogt on March 2, 1962, to confirm that the nearby Town of Dalhousie had been test drilling several sites in search of large quantities of fresh water, without success. The International Paper Company, located in Dalhousie, was the main source of employment in the town, but local unemployment was still a concern of the Town Council, which was trying to attract new industry to the area. In particular, the Town Council was interested in attracting Canadian Industries Limited (CIL), but, without a substantial supply of fresh water for industrial use, CIL would not be able to operate its plant in Dalhousie. To facilitate the establishment of the plant, New Brunswick Premier Louis-Joseph Robichaud assured CIL that his government would support Dalhousie's goals by securing at least 300,000 gallons of water per day by October 1963.

Within a week of this commitment, Robichaud asked the NBWA to act as coordinator of the project by dealing with the federal, provincial, municipal, and company agencies that would be participants in the venture. Dr Bates indicated that the most promising option was to dam the Eel River at or near its mouth, but if a tidal dam on the Eel River was the chosen option, "[t]iming is an urgent factor," since the dam would have to be constructed in the summer of 1962 to allow a year of fresh water flushing before the reservoir would be salt free.[43]

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[41] F.B. McKinnon, Regional Supervisor, Maritime Regional Office, Indian Affairs Branch, to Acting Chief, Reserves and Trusts, Indian Affairs Branch, February 27, 1962, DIAND file 271/31-5-13-1, vol. 1 (ICC Documents, p. 126).

[42] F.B. McKinnon, Regional Supervisor, Maritime Regional Office, Indian Affairs Branch, to Acting Chief, Reserves and Trusts, Indian Affairs Branch, February 27, 1962, DIAND file 271/31-5-13-1, vol. 1 (ICC Documents, p. 126).

On March 9, 1962, Vogt responded to McKinnon's memorandum, advising that the IAB had not yet been contacted by the NBWA. Vogt also requested information from McKinnon on the yearly value of the Indian clam harvest, but noted:

> The Eel River being a tidal river, the water front boundary of the Eel River Reserve is ordinary highwater mark and title to the bed of the river below ordinary highwater mark is vested in the Province. If the clams are gathered below ordinary highwater mark, the public generally would have a right to harvest the clams, and consideration will have to be given as to whether or not the Indian Band has any special right for which special compensation can be claimed.[44]

McKinnon's response on April 6, 1962, was that, while the Band generally harvested clams below the high-water mark, alongside the general public,

> non-Indians do so for their own use, while Indians attempt to do so commercially . . . attempts to put a dam at the road would be opposed not only by the Indians, but by just about everyone who does fish clams in that area. It could mean that public opinion would force the town to erect a dam a few hundred yards away from the road.[45]

McKinnon also attached a memorandum from Jean Bourassa, the Superintendent of the Restigouche Indian Agency, stating that "[a]lthough I do not know much of this industry," he was of the view that "50% of the revenue from clam digging in Eel River would be approximately $1,500 per year."[46] McKinnon noted that in his most recent discussion with Dr Bates, he was informed that "no action would be taken in regards to the dam without bringing together all those concerned," including the Band, the town, the NBWA, and the Department of Fisheries.[47]

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[43] John S. Bates, Chairman, New Brunswick Water Authority, Fredericton, NB, to David Vogt, Chief, Reserves and Trusts, Indian Affairs Branch, Department of Citizenship and Immigration, Ottawa, March 2, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, pp. 127-30).

[44] David Vogt, Chief, Reserves and Trusts, Indian Affairs Branch, Department of Citizenship and Immigration, Ottawa, to F.B. McKinnon, Regional Supervisor, Amherst, Nova Scotia, March 9, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 131).

[45] F.B. McKinnon, Regional Supervisor, Amherst, Nova Scotia, to David Vogt, Chief, Reserves and Trusts, Indian Affairs Branch, Department of Citizenship and Immigration, Ottawa, April 6, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 133).

[46] L. Jean J. Bourassa, Superintendent, Restigouche Indian Agency, Ste-Anne-de-Restigouche, Quebec, to Indian Affairs Branch, Maritime Regional Office, April 2, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 134).

In the meantime, Dr Bates advised IAB-Ottawa that the dam site was still in an exploratory stage. In a memorandum dated April 13, 1962, Vogt informed McKinnon that "Dr. Bates was instructed that the proposal should be gone into fully with you and with the Indians." Vogt also noted that, since the clam flats are in the vicinity of the highway bridge where the NBWA was first proposing to construct the tidal dam,

> Dr. Bates indicated it might be advisable to place a dam some distance upriver from the highway bridge more or less at a point which would be opposite the International Paper water pipeline. Selection of this location would seem to obviate interference with the clam flats, and I think we and the Indians might very well press for selection of that site.[48]

Three days later, McKinnon received a further report from J.H. Sheane, the new superintendent responsible for the Eel River reserve (which had recently been transferred to the Miramichi Agency from the Restigouche Agency), advising that he and Bourassa

> checked the approximate income again during a visit to Eel River and as a result of this second look both Mr Bourassa and myself agree that the income from sale of clams by Indians is probably nearer to $5,000 than to the $1,500 figure originally submitted by Mr Bourassa. This new factor places a somewhat different light on the matter in that the clam beds are probably more valuable to the Indians than originally estimated.[49]

Despite Bates's discussion with Vogt in April 1962, during which they appeared to have agreed that it would be preferable from the Band's standpoint to construct the dam upriver (also known as Site no. 1), Bates reported to McKinnon on August 21, 1962, that "[t]he Town Council has voted in favour of a tidal dam above Eel River Bar bridge at the first bend of the river near the bridge (also known as Site no. 2)."[50] McKinnon wrote to headquarters on August 27 noting that construction of the dam at Site no. 2 would cause some flooding of reserve lands, but "there is no difficulty anticipated with the [Band] council as long as the erection of the dam will not affect the clam flats."[51] He also suggested that the water could be pumped from the reservoir through an existing pipeline, owned by the International Paper Company, which already crossed the reserve, and he requested advice on whether International Paper could grant permission to the town to use the pipeline without the approval of the Minister of Indian Affairs.

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[47] F.B. McKinnon, Regional Supervisor, Amherst, Nova Scotia, to David Vogt, Chief, Reserves and Trusts, Indian Affairs Branch, Department of Citizenship and Immigration, Ottawa, April 6, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 133).

[48] David Vogt, Chief, Reserves and Trusts, Indian Affairs Branch, Department of Citizenship and Immigration, Ottawa, to Regional Supervisor, Maritime Region, April 13, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 135).

[49] J.H. Sheane, Superintendent, Miramichi Indian Agency, to Regional Supervisor, Maritimes, April 19, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 136).

Jules D'Astous, Chief of the Economic Development Division of Indian Affairs, responded to McKinnon on September 12, 1962. He stated that 3½ acres had been surrendered by the Band for the pipeline right of way in 1929 and that International Paper could, therefore, permit the town to use the pipeline without prior approval from the IAB or the Band. D'Astous advised, however, that if reserve lands were to be flooded, consent of the Indians would have to be obtained, the town would have to apply for an easement to flood, and a survey would have to be done to confirm the area of the reserve affected by flooding.[52]

McKinnon and Sheane continued to press for Site no. 1. After discussions with the town and the Eel River Band Council, Sheane stated that although Indian Affairs did not have

> a legal right to contest the erection of the dam at [Site no. 2] I believe the officials of the town concerned might be influenced to construct at the other site if we could get an educated opinion which would support the Indians reasoning that the clam beds may be partially or wholly destroyed if the dam is constructed at the site indicated.[53]

Sheane suggested that the effects of the dam required further investigation and he put forward the names of two experts on shellfish – Dr J.C. Medcof of the Atlantic Biological Station, Fisheries Research Board, in St Andrews, New Brunswick, and Dr E.R. Drinnan of the Oyster Culture Station – who might be able to assist by providing "a ruling prior to the next stage of negotiations with Dalhousie" on questions relating to the effect of the dam on the water current, whether the clams were "attracted to the muddy areas further upstream during early stages of their development," and the possibility of contamination in the stream.[54]

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[50] John S. Bates, Chairman, NB Water Authority, Fredericton, to F.B. McKinnon, Regional Supervisor, Amherst, Nova Scotia, August 21, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 140).

[51] F.B. McKinnon, Regional Supervisor, Amherst, Nova Scotia, to Indian Affairs Branch, August 27, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 144).

[52] Jules D'Astous, Chief, Economic Development Division, Indian Affairs Branch, to F.B. McKinnon, Regional Supervisor, Amherst, Nova Scotia, September 12, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 145).

[53] J.M. Sheane, Superintendent, Miramichi Indian Agency, to V.J. Caissie, Assistant Regional Supervisor, Maritime Regional Office, September 24, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 146).

McKinnon adopted Sheane's proposal and wrote to Dr Medcof on October 1, 1962, seeking his assistance in determining the effect of the proposed dam on the clam beds before proceeding with negotiations with the town. McKinnon drew attention to the Band's concerns:

> The area in question has long been known as a good clam producing area and the Indians fear that the erection of a dam may seriously affect this fishing. According to the Indians, the area to be flooded is one where clams are found in the early stage of development, although actual digging is not carried out at that point. The good producing area of today will be just below the dam, and tides and currents will be affected.[55]

On October 30, 1962, McKinnon discussed the matter with Dr Medcof and Dr J.S. MacPhail, also of the Atlantic Biological Station. Dr Medcof's report states that McKinnon was interested in knowing

> (1) Whether placing a dam in the estuary[56] of this river would affect the clam productivity of flats in the estuary below the dam and of flats outside the estuary in the Bay of Chaleur . . . and
>
> (2) Whether any likely damage would be diminished by moving the dam site a short distance upstream.[57]

The Band's concerns about the potential impact on the clams were apparently presented to Dr Medcof. The relevant excerpts of his findings and conclusions are set out below:

> The old idea of there being a need for a sanctuary for a breeding population was held by Indians of the area and this was the reason for proposing shifting the site

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[54] J.M. Sheane, Superintendent, Miramichi Indian Agency, to V.J. Caissie, Assistant Regional Supervisor, Maritime Regional Office, September 24, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 146).

[55] F.B. McKinnon, Regional Supervisor, Amherst, Nova Scotia, to Dr J.C. Medcof, Assistant Director, Fisheries Research Board, Biological Station, St Andrews, NB, October 1, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, pp. 147-48).

[56] The term "estuary" refers to the wide mouth of a river where the tide meets the current.

[57] Dr J.C. Medcof, Assistant Director, Biological Station, Fisheries Research Board of Canada, to Dr J.L. Hart, Director, Fisheries Research Board of Canada, November 1, 1962 (ICC Documents, pp. 150-51).

> upstream. They also, like many clam fishermen of this area, believe clam flats are replenished after digging, by migration of young clams to them from other areas.
>
> All we could say was that:
>
> (1) The area to be submerged has never, to our knowledge, produced clams, so there would be no reduction by encroachment on productive areas.
>
> (2) Dam construction would change the pattern of water circulation in the lower estuary and removal of substantial amounts of fresh water from the river system by the town of Dalhousie would raise the average salinity of the water in the lower estuary. These two changes are liable to affect the nature of bottom sedimentation and settlement of clam spat in the lower estuary where some rather poor, seldom-harvested clams grow. However, the interaction of these factors is so complex that we could not predict whether damming would effect a beneficial or deleterious change in the small area of productive clam ground in the lower estuary. Much less could we predict whether placement of the dam a few hundred feet further up the estuary from the site chosen by the town would be better from the point of view of conservation.
>
> (3) *We were confident that, no matter which dam site was chosen, the clam production of flats along the shore of the Bay of Chaleur (which are the industrially important flats) would not be affected.*
>
> (4) There is no sound basis for the theories (a) that special sanctuaries for breeding stocks are required to sustain production or (b) that young clams migrate from one area to another to replenish dug-out areas.[58]

Given that the purpose of consulting Dr Medcof was to obtain support for moving the dam to Site no. 1, his initial analysis of the situation offered little assistance to Indian Affairs and the Band. McKinnon noted that in view of Dr Medcof's opinion, "we really have no irrefutable arguments to insist that the town choose the upper site, at least in so far as clam production is concerned."[59]

Dr Medcof's report was provided to Chief Alfred Narvie and the Eel River Band Council and was discussed with the Band generally at a meeting held on November 20, 1962. Although Sheane could not attend the meeting, he provided the following report to the Maritime Regional Office of the IAB:

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[58] Dr J.C. Medcof, Assistant Director, Biological Station, Fisheries Research Board of Canada, to Dr J.L. Hart, Director, Fisheries Research Board of Canada, November 1, 1962 (ICC Documents, pp. 150-51). Emphasis added.

[59] F.B. McKinnon, Regional Supervisor, Amherst, to Miramichi Indian Agency, November 5, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 156).

> *The Band have decided that they will not permit the town authorities to cross over or use their land for this purpose because they feel there is a very strong possibility that the clam beds will be damaged with the erection of such a dam. However they have permitted a preliminary survey and they understand that the latest thinking is that the dam should be constructed further upstream away from their land altogether.* This new development which I could not confirm with the town authorities has apparently come about because it has been discovered that the banks of the river on the reserve side consist chiefly of moss which would not hold back the water. Thus construction of a dam at the point proposed would not be effective without the addition of a levee along the river bank.
>
> For the foregoing reason, the Band decided at their meeting to leave the matter in abeyance until the location of the dam is finally decided. *I understand if the town utilize the present proposed location [Site no. 2], the Band will do all in their power to prevent same.*[60]

McKinnon informed Dr Bates that the Band was opposed to Site no. 2 and that the location "above the Eel River Bar bridge at the first turn of the river might have to be abandoned for lack of footings."[61] Dr Bates planned to meet with Vogt in Ottawa during the week of December 10 to discuss the possibility of paying compensation to the Band:

> Mr. McKinnon indicated strong objection by the Indian Reserve to a dam at this lower location [Site no. 2] on account of affecting clam digging. Surely compensation could take care of any definite reduction of annual revenue, if it becomes clear that the largest possible storage reservoir for water is desirable and feasible.[62]

Dr Bates arranged to meet with Vogt in Ottawa on December 14, 1962, noting that "the development plan has reached an advanced stage."[63] Bates met with Vogt and with W.P. McIntyre of the IAB and informed them that the dam was to be built at Site no. 2 despite the Band's objections. Jules D'Astous provided the following report on this meeting to McKinnon:

> I understand that a sufficient volume of water could be obtained to supply the anticipated requirements of Canadian Industries Limited by building the dam at site

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[60] J.H. Sheane, Superintendent, Miramichi Indian Agency, to Maritime Regional Office, November 26, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 157). Emphasis added.

[61] John S. Bates, Chairman, New Brunswick Water Authority, Fredericton, to Town of Dalhousie and New Brunswick International Paper Company, November 29, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 158).

[62] John S. Bates, Chairman, New Brunswick Water Authority, Fredericton, to Town of Dalhousie and New Brunswick International Paper Company, November 29, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 158).

[63] John S. Bates, Chairman, New Brunswick Water Authority, Fredericton, to David Vogt, Chief, Reserves and Trusts, Indian Affairs Branch, December 3, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 160).

> no. 1. However, it is anticipated that the capacity of the New Brunswick International Paper Plant will be increased and in a matter of years an additional volume of water will be needed. To ensure an adequate supply of water for the town of Dalhousie and industry users, it is necessary to build a dam at site no. 2.
>
> On the basis of reports supplied by you and the Agency, Dr. Bates was told that the Indians would oppose construction at site no. 2 because of anticipated [adverse effect on] clam harvest. Although Dr. Bates and the Water Authority are not empowered to negotiate a settlement of Indian claims, Dr. Bates did suggest that the clam resources might be compensated by calculating the annual volume and value of the clam harvest and capitalizing this annual value. Further, [he] suggested that a survey of the clam resources be made during the 1963 season.
>
> We pointed out to Dr. Bates that in addition to a claim for damage to clam production, it would appear that the town of Dalhousie will have to negotiate an agreement with the Indians for Reserve land needed to anchor the dam and for the retaining wall. Also, if the building of the dam should result in flooding of the Reserve land the town would require an easement to flood.[64]

D'Astous advised McKinnon that he should begin to communicate with town officials to impress on them the need to "make known its requirements at an early date and open negotiations with the Indians. Delay in this connection could make it difficult or impossible for the town to fulfill its commitment to C.I.L. for next October."[65]

Dr Bates sent his own report on the results of this meeting to the Town Council and to International Paper on December 18, 1962, with copies to the IAB:

> The Indian Affairs Branch thinks the Indian Reserve will feel concerned regarding the dam at the lower site. . . . However, it is obvious that the potential of the Eel River cannot be made available at about 10 million gallons per day in low-water periods unless the tidal dam is so located.
>
> Compensation is a matter for negotiation by the Town of Dalhousie through the Indian Affairs Branch. So far as clams are concerned, it appears desirable to make a survey next summer through the Department of Fisheries and to estimate the possible decrease in annual value for capitalizing as compensation. Some points of law need clarifying, including the question of basin ownership by the Province of New Brunswick in relation to the rights by the Indian Reserve for clams above the bridge.

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[64] Jules D'Astous, Chief, Economic Development Division, Indian Affairs Branch, Department of Citizenship and Immigration, Ottawa, to Regional Supervisor, Maritimes, December 18, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, pp. 162-63).

[65] Jules D'Astous, Chief, Economic Development Division, Indian Affairs Branch, Department of Citizenship and Immigration, Ottawa, to Regional Supervisor, Maritimes, December 18, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, pp. 162-63).

> Section 35 of the *Indian Act*, 1952-56, simplifies procedures in connection with negotiations or expropriation.
>
> The Indian Affairs Branch assumes that land acquisition might include a strip around the basin for flooding, a wide cross section of the lower river for the dam, a strip across the peninsula for the proposed wall, perhaps the peninsula area on the river side of the wall and possibly other parcels.[66]

Finally, Dr Bates wrote that the IAB had also suggested that "employment of local Indians on construction and later on regular work in the area undoubtedly would help forthcoming negotiations with the Indian Reserve."

On January 3, 1963, when McKinnon responded to D'Astous's report on the December 14 meeting, he offered his views on the Band's right to compensation for its losses for damaged clam production:

> Eel River is tidal and it is our understanding that the Band does not enjoy riparian rights and therefore has no more claim to the clam fishing than the non-Indians, or for that matter anyone who wishes to fish clams in the area. We are only indirectly asking compensation for the loss of clam production by making compensation for the land need high enough to cover indirectly loss of clams. *In previous discussions with the town, we have made it clear to the town engineer that we could not oppose the town in their desire to erect a dam at that particular site, insofar as the river itself is concerned, but that the moment they stepped beyond high water mark, they would be on the reserve, and at that point we would request such compensation as we felt would be adequate to cover not so much the land, but the clams.*[67]

In short, although McKinnon did not think that the Band had any special or exclusive right to harvest clams on the flats, he felt that negotiations with respect to reserve land required for the dam should be conducted in such a way as to ensure that compensation was also provided for damage to the livelihood of Band members. McKinnon's proposed strategy, therefore, was to use compensation negotiations with respect to land required for the project as leverage to cover the Band's damages indirectly for loss of clams.

D'Astous acknowledged receipt of McKinnon's letter and apparently shared his view that "the Eel River is tidal and therefore ownership of the bed of the River is vested in the Crown and does not form part of the Reserve.

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[66] John S. Bates, Chairman, New Brunswick Water Authority, Fredericton, to Town of Dalhousie, Dalhousie, NB, and New Brunswick International Paper Company, Dalhousie, NB, December 18, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, pp. 164-65).

[67] F.B. McKinnon, Regional Supervisor, Maritime Regional Office, Indian Affairs Branch, to Indian Affairs Branch, January 3, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 166). Emphasis added.

Furthermore, fishing rights would be exerciseable by the public at large."[68] D'Astous indicated that he would await the outcome of an upcoming meeting with town officials to discuss the dam.

NEGOTIATIONS BETWEEN THE EEL RIVER BAND AND THE TOWN OF DALHOUSIE: PHASE 1 (1963)

On January 21, 1963, the Band held a meeting on the Eel River reserve to discuss the proposed dam with town officials. This meeting was attended by J.H. Sheane; Vince Caissie, McKinnon's Assistant Supervisor; Mr Furlotte, Dalhousie Town Councillor; Mr Petersen, Town Engineer; and Mr Smith, the mill engineer for International Paper Company. McKinnon's report states that:

> At this meeting, the Indian group advanced reasons which appear quite logical to us [the IAB], to prove that the erection of a dam would very likely completely destroy the clam beds and also put an end to smelt fishing during the winter months. These reasons all have to do with the change which will be made in the tide and current pattern and are too lengthy and complicated for me to attempt to explain here. *Because of this, the Indians have indicated that they will refuse to grant permission to the Town unless compensation is in the form of employment in existing or proposed industries.* Understandably the Town representation at this meeting could not commit themselves to any arrangements of this nature, but agreed to return to the Town Council and to secure information from those industries after which a second meeting would be held. . . .
>
> At an afternoon meeting between Town officials and Department representatives, the Town sought information on expropriation. *They were referred to Section 35 of the Indian Act, and were told that there was no certainty that the Governor-in-Council would grant permission in the face of complete opposition from the Band Council.*
>
> *Is there any likelihood that the Governor-in-Council would act against this opposition? If it should come to that, I think we can be reasonably certain that pressure will be brought to bear by the Provincial Government, which has confirmed the undertaking of the Town to provide water in sufficient quantities for the C.I.L. plant.*[69]

D'Astous agreed with McKinnon that "*the Minister would be very reluctant to approve expropriation contrary to the wishes of the Indians. He might do so if convinced that the necessity of the case justified expropriation.*

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[68] Jules D'Astous, Chief, Economic Development Division, Indian Affairs Branch, to Regional Supervisor, Maritimes Office, January 11, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 170).

[69] F.B. McKinnon, Supervisor, Maritime Regional Office, to Indian Affairs Branch, January 21, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, pp. 172-73). Emphasis added.

You should impress on Town officials the desirability of doing everything possible to meet the wishes of the Indians."[70]

Meanwhile, Dr Medcof began preparations to complete a survey of clam production with the assistance of J.S. MacPhail of the Atlantic Biological Station. Dr Bates indicated in a memorandum dated January 17, 1963, that rather than using a survey of clam harvests for the spring of 1963 as the basis for calculating annual yield, the "better approach would be to measure standing crop next spring [1963] as soon as the ice clears and before any construction begins and to measure it again a year after and possibly two or three years after as well. This would be the best way to find out whether damming has caused a change and, if there is a change, whether it is an increase or a decrease and how much." Medcof added that the 1963 survey should be considered tentative and "[t]o be fair, therefore, any settlement arrived at during the first year or two after dam construction should be regarded as tentative and subject to adjustment."[71]

On February 6, 1963, McKinnon met with the project's engineering assistant, Brian Barnes, and was informed that the town's preference for Site no. 2 was under reconsideration. The NBWA had discovered that its preferred site would incur expenses for reconstruction of the highway that no one could afford and that a site 1200 feet further upstream was being considered [Site no. 1]. Barnes's report of this meeting states that McKinnon "reiterated his earlier impression that the Indians felt they were being discriminated against by the residents of Dalhousie and that the Indians would be more co-operative if they could be assured of jobs in the town. He felt that the upper site would be more satisfactory as far as the Indians were concerned."[72]

On March 28, 1963, Sheane wrote to McKinnon reporting that the town's manager, Mr W.E. Petersen, had called to say that "his group" had recently met with the Band:

> *He [Mr. Petersen] states that the Band have authorized his crews to begin land clearing and diking immediately on the land portion. He stated that they had agreed to accept Dr Medcoff [sic] as an authority when compensation is considered but that they wanted an agreement signed before work was commenced on*

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[70] Jules D'Astous, Chief, Economic Development Division, Indian Affairs Branch, Ottawa, to Regional Supervisor, Maritimes, February 4, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 178). Emphasis added.

[71] Dr J.C. Medcof, Assistant Director, Fisheries Research Board of Canada, Biological Station, St Andrews, NB, to J.L. Hart, Director, Fisheries Researcher Board of Canada, Biological Station, Ottawa, January 30, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, pp. 175-77).

[72] Memorandum, Brian Barnes, Engineering Assistant, New Brunswick Water Authority, Fredericton, February 12, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, pp. 179-81).

> *the dam*. He and the Council are still proceeding in their efforts to obtain jobs for the men . . .
>
> The town solicitor is presently drawing up a preliminary agreement which the Indians of course will not sign without consultation with Indian Affairs officials. He will inform me when this document is ready. Possibly he may be rather more optimistic than the situation warrants but he appears to feel now that a mutually satisfactory agreement can be arrived at with Eel River Band members.
>
> . . . it now appears that a further meeting should be held soon with the Indians to discuss the town proposals and if agreement is reached, to take the necessary resolutions. I should like an opinion re the foregoing as soon as possible . . . It is considered essential that we be present if any agreements are in prospect.[73]

On April 1, 1963, McKinnon provided a lengthy report to IAB-Ottawa on the status of the negotiations with the Band and of a meeting between the Band and the town, although it is not clear whether he was referring to the same meeting recounted by Sheane. In his report, McKinnon confirmed the town's decision to move the dam to Site no. 1, 1200 feet upstream from the mouth of the river. He noted that the new site was selected "because of objections by the Indians, and also because of additional costs," and that this new proposal was presented to the Band by the town. Although the new site "would entirely clear the clam beds," McKinnon noted that it "would necessitate the erection of a dyke on reserve land, and result in flooding approximately 49 acres of swamp shore land." With respect to the meeting with town officials, McKinnon reported that

> the Indians again remained opposed to the dam, because of effects they claimed it would have on the fishing. They maintained, however, their previous stand that they would allow the Town to erect a dam if employment was provided to the able-bodied Indians on the reserve. It was also agreed at the meeting that the degree of loss to the fishing industry would be determined by Dr. J.C. Medcof of the Fisheries Research Board (Specialist in shell fish) and that both parties would accept his ruling. I enclose herewith a photocopy of a memo dated January 30th in which Dr. Medcof comments on the entire proposal.[74] You will note that Dr. Medcof is not prepared to say now whether this dam will have detrimental effects (or beneficial effects for that matter) on the fishery. Violent objection was taken by the Indians to the comment in

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[73] J.H. Sheane, Miramichi Indian Agency, to Maritime Regional Office, March 28, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 185). Emphasis added.

[74] Medcof had commented that "[i]f this statistical report were correct and the Indian claims of annual Eel River landings valued at $1,500 were correct, we would deduce that Eel River alone contributed three quarters of the total catch from District 63 in 1962. We seriously question this – someone is probably wrong somewhere." Dr J.C. Medcof, Assistant Director, Fisheries Research Board of Canada, Biological Station, St Andrews, NB, to J.L. Hart, Director, Fisheries Researcher Board of Canada, Biological Station, Ottawa, January 30, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 175).

Paragraph 9, Page 2. The Indians estimate their production of clams yearly at $30,000. The Indians at that meeting were asked to present to the Town their views as to what compensation should be if the fisheries were entirely destroyed.

A week later, another meeting was held on the Reserve, this time with the Indians only, in an attempt to arrive at a fair compensation. Roughly, the proposals were as follows:

(1) Compensation for land flooded at the rate of $1,000.00 an acre. (This amount is totally unrealistic in our views, but was possibly the result of false information obtained by an Indian from some non-Indian involved in recent Federal Government purchases of land for the nearby Charlo Airport. It was reported that the rate of $1,000.00 an acre had been paid, while in fact the highest rate was $175.00 an acre.)

(2) A total amount of $210,000. for the loss of clams based on an annual value of $30,000. multiplied by seven.

(3) A total of $17,500. for losses to other fisheries based on an annual crop valued at $2,500. multiplied by seven years.

It was further resolved at the meeting that these amounts would be reduced considerably if the Town could provide employment for the Indians. It is to be noted here that these amounts are based on entire losses and the percentage which would be paid to the Indians will be based on Dr. Medcof's survey.

I indicated earlier that the Indians have taken exception to the statement in Paragraph 9 of Dr. Medcof's report. The Indians are now in the embarrassing position of having to admit to us their actual gains from fishing, which needless to say would affect their relief to a considerable extent, or accepting Department of Fisheries figures and our own estimates of former years, thereby reducing considerably the amount of compensation they can hope to receive. In any case, it appears quite safe to say that the figure of $1,500.00 is far from correct. We have found some records kept by an Indian showing that in the month of July he purchased approximately 1,700 pails of clams at an average value of $1.50 per pail. This man is one of two buyers on the Reserve, and his purchases would equal approximately half the total production. His figures alone for one month of an eight-month season would be sufficient to prove that Department of Fisheries' figures are inaccurate. If we can believe the reports given to us by the Indians, and I am not prepared to reject them without adequate proof, it would seem that the yearly production was in the vicinity of 20,000 pails per year, which in turn would represent the $30,000 claimed by the Indians . . .

Following this meeting with the Indians, it was decided that our next step would be a meeting of the various unions operating in the Town of Dalhousie. Unfortunately, all the unions were represented by only one man, the President of the Union's Council. He did not offer too much hope in the field of employment, because of the seniority factor in unions, and the fact that there are unemployed union members in the Town at the moment, but he did agree to present our case at the general meeting of the Unions in the hope that they may have some solution to offer . . .

> At that meeting, the Town Manager admitted to us that work was already underway on the construction of the pipe line and the pump house in the Town. This does not yet affect Indian land, but the Town was very anxious to go ahead with certain phases of the job which would affect the reserve. We suggested to the Mayor and the Town Manager that it would be an opportune time to meet the band again to obtain their consent to this phase of the work, and also to offer counter proposals to those offered earlier by the band.[75]

McKinnon also attached to his memorandum a brief prepared by Indian Affairs, which was presented to the President of the Dalhousie Unions' Council, to support the First Nation's request for employment opportunities for the 10 to 15 able-bodied Indians on the reserve. This brief stressed that the coming of Canadian Industries Limited to the town was entirely dependent on obtaining a supply of fresh water. In order to obtain the water, the Indians' economy might be severely damaged, thereby necessitating that they be compensated in one form or another. Although Canadian Industries Limited would create approximately 45 jobs, the Indians were not qualified because the company required high school graduates. Therefore, Indian Affairs maintained that owing to "the possible total or partial destruction of their livelihood, the Indians should not be required to compete for jobs in Dalhousie on the same basis as local residents who have everything to gain by the erection of the dam."[76] It requested that special efforts be made to find employment for the Indians in other fields in the town – if they were given preferential treatment with respect to job opportunities, the Department was "prepared to contribute time and money" to assist in matching suitable candidates to jobs. Finally, Indian Affairs indicated that other unions across the country were very cooperative; it hoped the executive of the Dalhousie unions and its members would support the Band's request in view of the potential destruction of its fishing industry.

On April 9, 1963, the Band Council passed a Band Council Resolution (BCR) outlining terms and conditions under which construction of the dam would be acceptable to the Band. It reads as follows:

> 1. We, members of the Eel River Band of Indians, at a meeting held on April 9th 1963, Eel River Reserve, Province of New Brunswick do hereby resolve that permission be granted to the Town of Dalhousie, its agents, servants and workmen to enter

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[75] F.B. McKinnon, Maritime Regional Supervisor, Amherst, to Indian Affairs Branch, Ottawa, April 1, 1963 (ICC Documents, pp. 186-91).

[76] Transcript of Document 90, Proposed Remedial Action to Offset Possible Destruction of Eel River Indians Economy (ICC Documents, pp. 189-91).

upon our reserve and carry out the work necessary for the full completion of a dyke and dam as contained in the drawing by the Maritime Marshland Rehabilitation Administration, and to enter upon our Reserve whenever required to carry out the necessary maintenance upon the said dyke and dam.

2. Whereas the said dyke and dam will result in the flooding of certain shore lands as shown on the said drawing, the Town of Dalhousie shall on or before December 31st, 1963, or as soon as title to the land is acquired, compensate the band in the form of a $4,000.00 (Four Thousand dollars) payment for the land so flooded or utilized or in the form of land acceptable to the band as represented by the Band Council, in an acreage equal to that which will be flooded. The band further recommends that the Governor in Council grant to the Town the right to avail itself of the expropriation procedures as contained in Section 35 of the *Indian Act*.

3. Should the erection of the dam have an injurious effect on fisheries, it is further agreed that the Town of Dalhousie shall between September 1st and September 15th of the year 1967 pay compensation for one half the losses to the annual clam production of the entire river between the dam and the bridge on Highway No. 11 at the rate of 7 x $1.50 per 6 quart pail, and for losses to the annual smelt production at the rate of 7 x 6¢ per pound. The losses to the clam fishing shall be determined by the Fisheries Research Board of Canada and the losses to smelt fishing by the Area Representative of the Canada Department of Fisheries. These losses must be entirely due to the construction and erection of the dam.

4. Notwithstanding the provisions of paragraph 3 the amount of compensation to be paid by the Town for losses to the fisheries shall not exceed $50,000.00 (Fifty Thousand Dollars).

5. The band further agrees to reduce, under the provisions of paragraph 3 or 4, the compensation for losses to fisheries at the rate of 5% of the total amount payable for every male Indian who from the signing of this resolution until September 1st, 1967 will have obtained by any means and from any source, employment, the remuneration from which directly or indirectly shall not be less than $2,000.00. A commission to be composed of three members; one to be appointed by the Council of the Eel River Band, a second to be appointed by the agents of the Town of Dalhousie and the third to be mutually agreed upon by the Band Council and the said Agents, shall meet not less than every six months to determine if the employment is of such a nature as to qualify the Town to apply the 5% reduction. The commission shall determine its own terms of reference.

6. Whereas the New Brunswick Water Authority has indicated that the creation of a trout fishing pool as a tourist attraction in the reservoir created by the dam, would have no injurious effect on the water, the Eel River Band proposes to request assistance from the Indian Affairs Branch to further study this possibility. If the New Brunswick Water Authority grants permission to develop such a fishing pool, the Town of Dalhousie shall not object to and shall support only the application of the Eel River Band to the Province of New Brunswick for these exclusive fishing rights of the Band

> Members [from] such a pool. The town may be released from the provision of this clause at the discretion of the Minister of Citizenship and Immigration.[77]

The Band Council Resolution was signed by Chief Alfred Narvie and Councillors T. Frank Martin and Peter W. Narvie.

McKinnon sent a copy of the Band Council Resolution to IAB-Ottawa on April 16, 1963, along with a long memorandum indicating that the resolution was signed after a general Band meeting for the purpose of discussing the proposed construction of the dam. McKinnon stated that 25 eligible voters had attended the meeting, and that 24 of them had voted in favour of the proposed "agreement," which had apparently been distributed to Band members for their consideration. McKinnon noted that "[t]here are eighty-seven eligible voters in this band, but only thirty-eight are living on the reserve at the present time. The others are away, most of them in the United States."[78] McKinnon explained each of the clauses in turn. With respect to the question of authority to expropriate in paragraph 2, he explained:

> *The last sentence in paragraph 2 is self-explanatory and results in the fact that we wish to avoid surrender meetings. Because of the unavailability of the majority of voting members present, we would require at least two surrender meetings.* In the meantime we could not give to the Town unconditional authority to proceed with the work, and the Town in turn would not be able to meet the October 31st deadline set by the industry which is establishing in Dalhousie. *This was fully explained to the Band members and there were no objections voiced.*[79]

With respect to the employment clause, McKinnon wrote in later correspondence that "[i]t was felt that industries and services in the Town could reasonably absorb in their labour forces the twenty or so men on the reserve. It was made very plain at the beginning that the Indians were much more interested in the possibility of providing regular employment than in the casual earnings from clam-digging."[80] Therefore, it is clear that this clause was meant not only to create job opportunities but to provide *full* employment for the able-bodied men on the reserve. McKinnon noted in his report, however, that "it will be difficult to enter [it] in legal documents. Hard fast rules are going to be difficult to establish here." Also, the Band Council Resolution contained a proposal to develop a trout fishing pool as an economic development project for the Band, suggesting again that the focus on economic development and employment may have reduced the cash compensation provided for in the resolution. Finally, McKinnon noted that "the Indians raised the question of future possible damages, as a result of a break in the dam or some such incident. The Indians signed the resolution on the understanding that the matter of Town responsibility in such an event would be determined and if it proved necessary that it be spelled out in the agreement, it would be done at Headquarters. It would be appreciated if the matter was given consideration."[81]

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[77] Band Council Resolution, April 3, 1963 (ICC Documents, p. 192).

[78] F.B. McKinnon, Regional Supervisor, Maritime Regional Office, Indian Affairs Branch, to Indian Affairs Branch, April 16, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 194).

[79] F.B. McKinnon, Regional Supervisor, Maritime Regional Office, Indian Affairs Branch, to Indian Affairs Branch, April 16, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, pp. 194-95). Emphasis added.

[80] F.B. McKinnon, Regional Director of Indian Affairs, Maritime Regional Office, Amherst, NS, to Dr J.C. Medcof, Assistant Director, Fisheries Research Board, Biological Station, St Andrews, NB, January 9, 1968, DIAND file 271/31-513-3-1, vol. 1 (ICC Documents, p. 342).

On April 24, 1963, D'Astous responded to McKinnon's report and request for instructions on the steps to be taken to conclude the agreement between the Band and the town:

> [I]t appears the Town will require an area of land on which to place the reserve end of the dam, an easement to flood adjacent land and access over the reserve to the dam. A grant with respect to the land, flooding and access presents no problem especially if the grant can be made under the authority of Section 35 of the *Indian Act*. In this connection, the Solicitor for the Town of Dalhousie should be asked to provide proof of the fact that the Town has a statutory power to expropriate land needed for the Town water system.
>
> At the moment we are not certain whether the Indians have a legally enforceable claim for loss of income from clam harvesting and other fishing should the construction of the dam have an adverse effect on clam and fish production. However, an answer to this question is not essential if a legally enforceable agreement is reached with the Town to pay compensation in the event of a reduction of income from the fishing.
>
> The compensation scheme embodied in the Council Resolution will require some thought and it is being referred to the Departmental Legal Adviser for consideration and advice.[82]

On the same day, D'Astous sent a copy of the Band Council Resolution to the IAB Legal Advisor to request his "views as to the incorporation of the terms of the proposal in a legally enforceable agreement."[83]

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[81] F.B. McKinnon, Regional Supervisor, Maritime Regional Office, Indian Affairs Branch, to Indian Affairs Branch, April 16, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, pp. 195-96).

[82] Jules D'Astous, Chief, Economic Development Division, Indian Affairs Branch, Ottawa, to Regional Supervisor, Maritimes Office, April 24, 1963, DIAND file E-5661-3-06013D2, vol. 1 (ICC Documents, p. 197).

[83] Jules D'Astous, Chief, Economic Development Division, Indian Affairs Branch, Ottawa, to Legal Advisor, Indian Affairs Branch, April 24, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, pp. 198-99).

On May 6, 1963, McKinnon wrote back to D'Astous to confirm that he had sought proof from the Town of Dalhousie of its power to expropriate. He also wrote to clarify what he saw as the basis for the compensation negotiations with the town:

> From the very beginning of our negotiations, we made it plain to the Indians and to the Town that the Indians had no legal claims to any of the fisheries in the river because it was tidal. *The legal basis for a settlement for loss of clams rests, in our views, simply in the fact that if the Town does not accept to pay for such losses, the Indians would simply not allow them access over the reserve in order to construct and maintain the dam. While the land in itself is only worth a few dollars, it protects clam production in the river to which the Indians have access. In reality, the Town will be paying all its compensation for the land, since the Indians realize they cannot sell what they do not own. The value of the land, however, will depend on the effects the dam will have on the fishing. For this reason, it is necessary that the value of those fisheries becomes part of the total settlement.*
>
> As long as the agreement which has been signed by the Indians and will be signed by the Town makes it binding upon the Town to respect the terms incorporated for fishing losses, it is all we require. If, however, the Town could conceivably break the agreement later on on the basis of the fact that the Indians do not own the fishing, then it should be made very clear now, because I am convinced that the band will take an entirely different view.[84]

On May 8, Town Manager Petersen wrote to McKinnon to advise him that the town did have expropriation powers pursuant to provincial legislation. A copy of the *Towns Act*[85] was later provided to the IAB as proof of the town's authority to expropriate lands for the purpose of carrying out any of its powers and duties.[86]

On June 4, Sheane wrote to McKinnon to suggest that, since clam digging was under way on the river, Dr Medcof's clam survey should be carried out as soon as possible "before the beds have become partially depleted. You will agree that this would be detrimental to the Indians case and in favour of the town."[87] He also advised that the Indians were not accepting offers of employment to clear the land to construct the dike because Chief Narvie indicated that the town was offering $40 to $75 per acre, whereas members of the Band did not feel they could make any money unless they were paid $100 per acre.[88] A week later, Sheane wrote that the dispute over the clearing work had escalated, but appeared to have been resolved through negotiations between the Band, Sheane, and town representatives, and that the work was being completed by Band members at a compromise figure of $90 per acre. Sheane also pointed to "the urgent necessity of having the agreement obtained by ourselves from the town and the Indians, processed by the Department. Following completion of the present work phase[,] actual dam construction will commence and it would be unfortunate if the project had to be cancelled following a large expenditure on the part of the Town."[89]

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[84] F.B. McKinnon, Regional Director of Indian Affairs, Maritime Regional Office, Amherst, NS, to Indian Affairs Branch, May 6, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 201). Emphasis added.

[85] *Towns Act*, RSNB 1952, c. 234, and amendment, c. 70.

[86] W.E. Petersen, Town Manager, Town of Dalhousie, to Indian Affairs Branch, Maritimes Office, May 8, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 203). Petersen cited the "Acts of the Legislature of New Brunswick 10-11 Elizabeth II, 1961-62, Chapter 70, Sections 131 and following" as the basis for the town's expropriation powers.

In the meantime, D'Astous had written again to the Departmental Legal Advisor seeking an opinion and an assessment of the proposed agreement.[90] On August 19, 1963, D'Astous wrote to McKinnon indicating that the Legal Advisor had concluded that expropriation would not be appropriate in these circumstances. According to the Legal Advisor, the expropriation powers conferred on the Town of Dalhousie by the provincial *Towns Act*

> are exercisable by the Town only in the event that an agreement is not or cannot be reached with the land owner. The Council Resolution, provided the terms thereof are acceptable to the Town, is tantamount to an agreement and therefore the expropriation powers are not exercisable.[91]

Therefore, the Legal Advisor recommended that an interim permit be granted under section 28(2) of the *Indian Act* pending a surrender of the land from the Band and a formal grant of land to the town by letters patent. D'Astous advised that the Department was working on a draft permit and suggested that McKinnon request that the town pass a resolution to accept and approve the April 9, 1963, Band Council Resolution "as the basis for a formal agreement between ourselves and the Town." Sheane made this request to the town, and a formal resolution from the town was provided on September 12, 1963, and forwarded to the Legal Advisor.[92]

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[87] J.H. Sheane, Superintendent, Miramichi Indian Agency, to Maritime Regional Office, June 4, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 206). The first survey was actually carried out in July 1963 (ICC Exhibit 2, tab 18).

[88] J.H. Sheane, Superintendent, Miramichi Indian Agency, to Maritime Regional Office, June 4, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Document p. 206).

[89] J.H. Sheane, Superintendent, Miramichi Indian Agency, to Maritime Regional Office, June 11, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 209).

[90] Jules D'Astous, Chief, Economic Development Division, Indian Affairs Branch, Ottawa, to Legal Advisor, Indian Affairs Branch, June 18, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 212).

[91] Jules D'Astous, Chief, Economic Development Division, Indian Affairs Branch, Ottawa, to Regional Supervisor, Maritimes, Indian Affairs Branch, August 19, 1963, DIAND file E-5661-3-06013-D2, vol. 1 (ICC Documents, p. 220).

It was not until November 22, 1963, that D'Astous sent to McKinnon a first draft of the agreement, prepared by the Department, which attempted to reflect the "meaning and intent" of the April 9, 1963, Band Council Resolution.[93] Under the terms of this draft agreement, the Band was to receive $4000 from the town for rights to use reserve land plus a maximum payment of $50,000 in compensation for the loss of the fishery, to be calculated at the rate of "$10.50 per six (6)-quart pail of clams" and 42 cents per pound of smelts.[94] (The figure of $10.50 per pail appears to be a typographical error, since the 1963 resolution states that the price shall be based on $1.50 per pail, a sum more consistent with reports on the market value of clams.) In December 1963, Sheane and McKinnon provided their comments on the draft agreement prepared by IAB-Ottawa. D'Astous asked them not to discuss the draft with the Band or the town at this point, since he wished to continue to work on the draft with the Legal Advisor before reviewing it with the parties. Accordingly, Sheane's and McKinnon's views were their own and do not purport to represent those of the Band. Sheane expressed concerns about the method used to calculate compensation and the difficulty in estimating the loss of clam and smelt production. In view of these concerns, Sheane stated: "I cannot agree that any final agreement to sell the land be signed until iron-clad guarantees regarding compensation are made by the town."[95]

McKinnon echoed Sheane's comments about the difficulty in assessing losses to the fishery, since no survey figures were yet available. (These figures were provided approximately a month later, although the survey itself was conducted in July 1963.) McKinnon also emphasized that with respect to the employment clause, the parties understood it to mean permanent employment, not a "series of jobs of a purely temporary nature." Finally, McKinnon expressed doubts about Dr Bates's sincerity regarding the establishment of a trout fishery:

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[92] J.E. Sheane, Superintendent, Miramichi Indian Agency, to W.E. Petersen, Town Manager, Dalhousie, NB, September 3, 1963, DIAND file, E-5661-3-06013-D2, vol. 1 (ICC Documents, p. 223); W. Edgar Petersen, Town Manager, Dalhousie, NB, to J.E. Sheane, Superintendent, Miramichi Indian Agency, September 12, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 225); Jules D'Astous, Chief, Economic Development Division, Indian Affairs Branch, to Legal Advisor, Indian Affairs Branch, September 26, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 227).

[93] Jules D'Astous, Chief, Economic Development Division, Indian Affairs Branch, to Regional Supervisor, Maritimes, November 22, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, pp. 228-29).

[94] Draft Agreement between Canada and Town of Dalhousie, [November] 1963 (ICC Documents, pp. 230-33).

[95] J.H. Sheane, Superintendent, Miramichi Indian Agency, to Maritime Regional Office, December 4, 1963 (ICC Documents, p. 243).

> [I]t was my opinion at the time that his [Dr Bates's] suggestion that a trout fishery be established was simply bait. The Indians were told so by myself at one of the meetings, but it was added that we would press for a firm commitment from Dr. Bates. So far he has skilfully avoided our requests to put this offer in writing, but we shall continue pressing him to do so.[96]

The dam on the Eel River was completed by November 1963, without an agreement on compensation or any formal authorization provided under the terms of the *Indian Act* in the form of a surrender, expropriation, or permit.

NEGOTIATIONS ON EMPLOYMENT AND VALUE OF THE CLAM FISHERY: PHASE 2 (1963-68)

From 1963 until early 1968, negotiations continued between the town and the Band in an attempt to reach agreement on the terms and conditions of a formal and legally binding document. Many problems arose between the parties, and the NBWA withdrew from the negotiations until early 1968. The main problem was that the town was either not making any efforts or was unable to secure employment for the Band. Whatever the reasons, the result was that efforts to reach agreement on terms concerning employment, value of the clam fishery, and other matters of concern to the Band became more difficult as time passed.

To assess properly the compensation payable to the Band under the terms of the 1963 Band Council Resolution, three surveys of the soft-shell clam population at Eel River Cove were conducted in July 1963, July 1964, and August 1967 to determine whether any damage was caused to the clam harvest as a result of the dam's construction. The first of these three surveys was done by Dr J.S. MacPhail of the Atlantic Biological Station in July 1963 (before the dam was completed), and his complete report was forwarded to the IAB on January 15, 1964. Dr MacPhail's report suggests that, given the dam's position upstream from the productive clam flats, it was unlikely that there would be any effect on the water level in the cove at periods of low tide. The report indicates that there was a ready market for selling clams to tourists and picnickers, and that diggers sold their catch for $1.50 to $2.00 per

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[96] F.B. McKinnon, Regional Supervisor, Maritime Regional Office, to Indian Affairs Branch, December 10, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 245).

6-quart pail of clams, but that they could receive as much as $2.25 per pail if the clams were steamed. In previous years, surplus stocks of clams were sold to factory processors in Buctouche for $1.00 per pail. Dr MacPhail's main conclusions were as follows:

> Clams are indeed abundant in Eel River cove. A total of 77,000 6-quart pails of marketable clams is remarkable today for 39 acres of flats. This is equivalent to about 350 bushels per acre which was considered good digging in our coastal areas 15 years ago. Several factors likely contribute to maintaining this good population of clams.
>
> (a) The flats are always submerged. This makes digging a difficult task and prevents efficient recovery of clams from the soil that is turned. It also prevents systematic turning of the populated ground. In short, it tends to reduce the intensity of the fishery.
>
> (b) There is no processing plant in the immediate vicinity to handle low-priced catches in excess of high-priced tourist purchases. This, too, reduces the fishing intensity by confining the greatest fishing effort to the summer months.
>
> (c) If weather conditions are unfavourable, particularly on week-ends during the summer months, sales to tourists and picnickers drop drastically and consequently digging is slight until accumulated catches are sold.
>
> (d) There are relatively few persons in this area who wish to supplement their earnings by digging clams. This absence of intense digging is exemplified by the comparatively higher density of clam populations in sections 1, 2 and 3 than in sections 4, 5 and 6 . . . where soft, muddy soils are a deterrent to diggers although the rewards for fishing would be greater.[97]

Dr MacPhail stated in his acknowledgments that he was "indebted to Chief Alfred Narvie, Eel River Band, for general background knowledge and history of the clam fishery in Eel River Cove."[98]

As mentioned above, the issue of compliance with the understandings set out in the 1963 Band Council Resolution concerning employment became crucial in the discussions that followed. There was much discussion of how to make the clause work, including suggestions that the commission referred to in the resolution be constituted right away to get its views on how to draft this term in the agreement.[99] On January 14, 1964, IAB officials met with representatives of the Band and the town in the presence of Magistrate J.T. Troy, who was to serve as the independent member of the committee, to discuss the wording of this clause; at the end of the meeting, however, it was agreed that the wording in paragraph 3 of the draft agreement was sufficient because it would give the committee "all possible freedom . . . to operate efficiently and fairly."[100]

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[97] Eel River Band, Eel River Indian Reserve No. 3, Expropriation for Dam Specific Claim, Draft Historical Report, undated (ICC Exhibit 4, p. 105).

[98] Eel River Band, Eel River Indian Reserve No. 3, Expropriation for Dam Specific Claim, Draft Historical Report, undated (ICC Exhibit 4, p. 106).

On April 23, 1964, the Band requested a meeting with the Mayor and the Town Manager, which Sheane and Caissie also attended, "to express their dissatisfaction at the attitude of the Town and also to suggest that a second look at the agreement be taken with a view of adding much stronger clauses dealing with employment."[101] McKinnon's report on this meeting noted that

> . . . some Indians felt that the deal should be entirely cancelled and forgotten.
>
> From the very beginning of negotiations, the Indians were interested only in obtaining employment. It was their feeling, as well as ours, that paragraph 3 of the agreement would be sufficiently attractive to the Town to have them make special efforts to locate employment for the Indians. This has apparently not been the case, and so far after almost one year, not one Indian has been able to obtain employment. At all our meetings subsequent to the passing of that agreement, the Town has found excuses such as their lack of control over the mill, the C.I.L. plant, and other employers, pressure on the council for municipal jobs by Town residents, and the number of unemployed in the Town. They feel this is justification for their lack of action in this respect.[102]

McKinnon forwarded with his report copies of two letters he had sent to the National Employment Office and to the International Longshoremen's Association, each of which raised a concern with respect to practices or efforts made in relation to employment that the Band had identified as worthy of investigation. McKinnon concluded by saying that "if no action has been taken to have the Minister confirm the agreement," none should be taken until the IAB heard further from him in relation to his inquiries.

Over the next several months, numerous concerns were expressed by Indian Affairs officials about the lack of job opportunities made available to members of the Band. In his Agency report to D'Astous of June 4, 1964, McIntyre stated that the "Indians and Field staff however are of the opinion the Town authorities have made little effort to obtain employment for Indians." He had the impression, however, "that the Town is not so much evading its undertaking as that the Mayor is at a loss to know how to go about fulfilling it."[103] On August 5, Sheane reported to Ottawa that Chief Narvie could provide evidence that Band members were being discriminated against because "the permanent Longshoremen's Union in Dalhousie are still bringing in their relatives and ignoring the seniority system."[104] From the time when the 1963 Band Council Resolution was passed, only a few band members[105] had acquired permanent positions, but McKinnon suggested in 1965 that at least some of this employment was "a direct result of the forceful representations made by Mr. Sheane and this office."[106]

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[99] Jules D'Astous, Chief Economic Development Division, Indian Affairs Branch, to Regional Supervisor, Maritimes, December 19, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 254).

[100] F.B. McKinnon, Regional Supervisor, Maritime Regional Office, to Indian Affairs Branch, January 27, 1964, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 256).

[101] F.B. McKinnon, Regional Supervisor, Maritime Regional Office, to Indian Affairs Branch, April 27, 1964, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 258).

[102] F.B. McKinnon, Regional Supervisor, Maritime Regional Office, to Indian Affairs Branch, April 27, 1964, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 258).

At the same time, Sheane reported that "the Fisheries people conducted another survey with preliminary indications of a decided drop in the clam resources."[107] Nevertheless, it was difficult for the IAB to reach any definite agreement on compensation until the Department of Fisheries completed its clam surveys to determine the extent of the dam's effect on the fishery. On September 3, 1964, the second clam survey report was provided by Dr MacPhail. He wrote that "[t]he most remarkable change since the construction of the dam [in November 1963] is the small amount of water remaining on the flats at periods of low tide."[108] Dr MacPhail's main conclusions in relation to the clam survey were as follows:

> 1. Comparison of the two years' estimates of volumes of marketable clams available indicates that there were only two-thirds as many as in 1963. In section 3 there is a considerable difference in the volume of available marketable clams – about 70% less than in 1963. This may be the result of heavy fishing since the soil in this portion of the cove is easily dug and consequently is a favourite spot for both

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[103] W.P. McIntyre, Economic Development Division, Indian Affairs Branch, to Chief, Economic Development Division, Indian Affairs Branch, June 4, 1964, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 266).

[104] J.H. Sheane, Superintendent, Miramichi Indian Agency, to A/Chief, Economic Development Division, August 5, 1964, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 269).

[105] Superintendent J.H. Sheane refers specifically to four men who had become permanent members of the Longshoremen's Union in a memorandum to the Maritime Regional Office on January 14, 1965 (ICC Documents, p. 275).

[106] F.B. McKinnon, Regional Supervisor, Maritime Regional Office, to Indian Affairs Branch, January 18, 1965, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 276).

[107] J.H. Sheane, Superintendent, Miramichi Indian Agency, to A/Chief, Economic Development Division, August 5, 1964, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 269).

[108] Eel River Band, Eel River Indian Reserve No. 3, Expropriation for Dam Specific Claim, Draft Historical Report, undated (ICC Exhibit 4, p. 114).

> picnickers and commercial diggers to gather clams. However, marketable clams are still abundant in Eel River Cove averaging about 230 bushels per acre which is high compared with most clam producing flats in the Maritimes. Young clams are still abundant and there are prospects of good digging in 1965.
>
> 2. When the total numbers of clams taken in the 1963 and 1964 samplings are compared, there appears to be no essential differences in the population . . . The relationship of nonmarketable to marketable clams is approximately 65% and 35% respectively for both years.
>
> 3. The great reduction in the amount of water over the flats at periods of low tide makes digging easier. Picnickers, in particular, who previously dug one-half pail will now double that amount with the same effort. This may encourage greater numbers of people to work the flats, eventually resulting in a reduction in the clam populations.[109]

MacPhail stated that the results of the 1964 survey did not "permit a clear conclusion on the direct or indirect effects on clam stocks of damming the estuary of Eel River"[110] and, therefore, recommended that the area be sampled again in 1966 to better assess the long-term effects of the dam on clam production.

Between the spring of 1964 and the spring of 1966, negotiations had slowed down considerably, for reasons not entirely clear from the record. In the intervening years, a substantial turnover in the participants had taken place. The Town Manager had died,[111] and the Mayor and one councillor had been replaced. The task of convincing the new representatives that they had a legal responsibility, in the absence of an agreement signed by the Minister, was onerous.

In the spring of 1966, the Band's and the IAB's dissatisfaction with the employment situation came to a head. McKinnon wrote to the IAB reporting on a meeting held on April 5, 1966, with Mayor Dillon Arsenault and one of his councillors concerning the town's lack of effort in securing jobs for the Band. The town's representatives suggested that the IAB meet directly with representatives of the pulp mill to find out what the problem was. Although McKinnon was of the view that this was supposed to be the town's responsibility, he agreed to do so to prompt some action. The mill's representatives indicated that because of the length of the unions' unemployed members' lists, it would be some time before new employees could be offered work. They also indicated that "[a]pproximately a year ago the Mill instituted a new policy, whereby people with less than a Grade 10 education would not be considered for employment unless it was absolutely necessary," but that they were willing to consider Band members who did not meet this requirement once the unemployed members' lists were retired.[112]

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[109] Eel River Band, Eel River Indian Reserve No. 3, Expropriation for Dam Specific Claim, Draft Historical Report, undated (ICC Exhibit 4, p. 115).

[110] Eel River Band, Eel River Indian Reserve No. 3, Expropriation for Dam Specific Claim, Draft Historical Report, undated (ICC Exhibit 4, p. 116).

[111] F.B. McKinnon, Regional Supervisor, Maritime Regional Office, to Indian Affairs Branch, September 15, 1965, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 280).

McKinnon indicated that he did not place any faith whatsoever in the explanations offered by the town for this regrettable situation. He wrote:

> It is becoming quite obvious that the Town, now enjoying the water privileges, are not doing too much if anything at all to satisfy the spirit of the agreement by providing employment for the Indians. I think this accusation can be documented quite easily. Since the agreement was entered into, the Mill went from a five day week to a seven day week, and this resulted in the hiring of a fairly large number of people. Although the Indians have their applications at the mill, the Town apparently did not make any representations to the Manager for special consideration to Indians. This is quite contrary to what the Town Council leads us to believe. There has been at least one municipal project, the construction of a fire hall, where Indians could have worked, but the Town made no effort to employ any of them. As a matter of interest also, even during the construction of the dam itself, Superintendent J.H. Sheane had to visit the Town Office at least on one occasion to complain very strongly because Indians were not being given employment.[113]

McKinnon concluded by stating that both he and the Band were of the view that it was time to issue an ultimatum to the town and to seek full value of the clams:

> The value of those clams was established two years ago, if you remember, at something like $115,000.00. Were we to use the formula employed with Indians in the North when trap lines were destroyed, I believe we would multiply this annual value by seven making it a grand total of $805,000.00. Since the Indians are only laying claim to half the clams, this would still represent close to a half million dollars.[114]

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[112] F.B. McKinnon, Regional Director, Maritime Regional Office, to Indian Affairs Branch, May 2, 1966, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 286).

[113] F.B. McKinnon, Regional Director, Maritime Regional Office, to Indian Affairs Branch, May 2, 1966, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 287).

[114] F.B. McKinnon, Regional Director, Maritime Regional Office, to Indian Affairs Branch, May 2, 1966, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 287). McKinnon is referring to the figure presented in the 1964 clam survey, where McPhail found that 77,017 pails of marketable clams were available to the diggers. (This number x 1.50 = 115,000).

He added that the Band Council intended to launch a media campaign, the plan being "to simply shame the Town by making it known as far and wide as possible that the Indians have put their livelihood at stake in order to improve the economic prospects of the Town and that the Town on the other hand has apparently not been willing to give any consideration at all to the desire of the Indians for full employment."[115] Given the apparent need to issue an ultimatum to the Town Council, McKinnon called for a special meeting between the town and the Band Council.

The meeting was held on May 18, 1966, and was attended by eight of nine town councillors, the town's former negotiator, three Band Council members, two other Band members, and Sheane and Caissie on behalf of the Department. McKinnon reported that the meeting had become "quite stormy" when Mayor Arseneault interrupted Sheane's summary of the situation to deny "that they had any responsibility to assist in locating employment. He categorically refused to recognize that this was the intent of the employment clauses in the agreement and ended by indicating that he had no intentions of interceding with anyone to secure employment for Indians." The Band Councillors felt it was futile to continue the discussion and left the meeting, although Sheane and Caissie stayed on for another hour "in the hope that the Mayor might recognize the full implications of his position and consent to compromise. He had not when they left."[116]

McKinnon also reported that Sheane and Caissie met with the Band Council and some Band members later that evening to ask that they let things cool down before taking any action: "This is a level-headed council and it is felt they will remain calm; Councillor Wallace LaBillois intends however to give this situation some publicity in the newspaper." McKinnon painted a bleak picture:

> One thing is reasonably certain. The Indians will refuse to allow any reduction in the compensation for any reason, and particularly in the form suggested in the so-called agreement as it related to employment. I would suspect it will be impossible to salvage any part of the agreement.
>
> The Council felt that the next step was a band or council meeting at which a legal officer of the Branch would explain the present status of the agreement and recources [sic] under the law available to the Indians. It was felt that you should be the one to attend this meeting, and Mr. Caissie agreed to relay the message to you. Mr Labillois

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[115] F.B. McKinnon, Regional Director, Maritime Regional Office, to Indian Affairs Branch, May 2, 1966, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 287).

[116] F.B. McKinnon, Regional Director, Maritime Regional Office, to Administrator of Lands, Indian Affairs Branch, Ottawa, May 20, 1966, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, pp. 288-89).

> [sic] said he would extend an invitation to Mr Len Marchand, whom he knew and whose position he felt might have a salutory [sic] psychological effect on the Town Council.[117]

McKinnon asked the Administrator of Lands at the IAB for a prompt response to his letter and reiterated his request for a meeting on June 23, 1966.

Despite McKinnon's unequivocal request for a meeting between IAB officials and the Band Council to discuss the available legal options, there is no record of any further action until December 13, 1966, when the executive assistant to the Assistant Deputy Minister of Indian Affairs, R.F. Battle, asked D'Astous to draft a letter to Wallace LaBillois requesting the town's support in hiring 15 Indians as "part of the consideration in connection with the use of the Indian property in question." This letter seems to have been prompted by a conversation concerning events at Eel River that Battle had with Wallace LaBillois at a meeting in Winnipeg the previous week.[118]

The pace of the negotiations began to accelerate as senior officials at the Ottawa headquarters of IAB became more actively involved in the matter. On December 19, 1966, D'Astous, as Director of Administration, wrote to the Acting Chief of Lands to advise that he had spoken with Wallace LaBillois to follow up on his conversation with Battle regarding employment for the Band. LaBillois apparently felt that there was no point in pursuing discussions with the town about employment and that adequate cash compensation should be sought instead:

> The situation is that the Indians have given up all hopes of having the City of Dalhousie help them find jobs. They want the Branch to serve notice to the Mayor that the terms previously negotiated do not stand anymore and that what is expected of the City now is an offer in money for full compensation of the land taken, the land flooded, the loss or revenue from clam digging, etc. The Indians mentioned the settlement should not be less than $100,000 but I do not think we should mention any figures at this stage.[119]

On January 27, 1967, Battle wrote to Mayor Arsenault stating that the dam was now in operation and that the fisheries had been adversely affected. He noted that while the town was benefiting from the arrangement, there had been no benefits whatsoever for the members of the Eel River Band, nor did it appear there would be. Battle pointed out that "[a]s is the practice in the Indian Affairs Branch of this Department, it has been left to the Indian Band, assisted by Regional and Agency officials of the Branch, to negotiate with your town to achieve adequate compensation. The continued lack of success makes it necessary now for Department officials here in Ottawa to intervene on behalf of the Band." Since the Band was no longer interested in obtaining employment assistance from the town because of its lack of effort, he advised that "[t]he position now taken by the Band, which the Department supports, is that it is entitled to full compensation for the loss it has suffered, both to its lands and its means of economic support. . . . I must point out that the Band has been deprived of its just entitlement for over three years and in view of this I would ask that you consider payment of compensation as early as possible."[120]

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[117] F.B. McKinnon, Regional Director, Maritime Regional Office, to Administrator of Lands, Indian Affairs Branch, Ottawa, May 20, 1966, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, pp. 288-89).

[118] J.D. Darling, Executive Assistant, Department of Indian Affairs and Northern Development, to Jules D'Astous, Chief, Economic Development Division, Indian Affairs Branch, December 13, 1966, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 291).

[119] Jules D'Astous, Director of Administration, Indian Affairs Branch, to Acting Chief, Lands, Membership and Estates Division, December 19, 1966, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 292).

The Town Administrator promptly responded to Battle's letter, advising that the Mayor and the Council were willing to meet for a full discussion at his earliest convenience.[121] This meeting was postponed, however, first on account of Battle's illness and then by Indian Affairs' decision to wait for the final study by the Fishery Research Board.[122] Dr Medcof wrote to McKinnon in July to request that he advise Chief Narvie and the Agency that he intended to be at Eel River Cove on August 1, 1967, to complete the third, and final, survey on the clam populations.[123]

Dr Medcof completed his report, entitled "Third Survey of Eel River Cove, N.B., Soft-Shell Clam (Mya arenaria) Population," in November 1967.[124] The report, which was forwarded to the IAB in late January 1968,[125] contained the following summary and conclusions:

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[120] R.F. Battle, Assistant Deputy Minister, Indian Affairs, Ottawa, to Mayor Dillon Arsenault, Town Hall, Dalhousie, NB, January 27, 1967, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, pp. 301-02).

[121] Daniel E. Noel, Town Administrator, Town of Dalhousie, NB, to R.F. Battle, Assistant Deputy Minister, Indian Affairs, Ottawa, February 17, 1967, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 303).

[122] G.A. Poupore, Chief, Lands, Membership and Estates, to Regional Director of Indian Agencies – Maritime Region, June 8, 1967, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 305).

[123] J.C. Medcof, Assistant Director, Fisheries Research Board, Biological Station, St Andrews, NB, to M.A. MacDonald, District Protection Officer, Department of Fisheries, Newcastle, NB, July 25, 1967, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, pp. 309-10); J.C. Medcof, Assistant Director, Fisheries Research Board, Biological Station, St Andrews, NB, to F.B. McKinnon, Regional Director of Indian Affairs, Maritime Region, Amherst, NS, July 25, 1967, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 311).

[124] J.C. Medcof, Fisheries Research Board, Biological Station, St Andrews, NB, "Third Survey of Eel River Cove, N.B., Soft-Shell Clam (Mya arenaria) Population," November 1967 (ICC Exhibit 2, tab 20).

[125] J.M. Anderson, Director, Fisheries Research Board of Canada, Biological Station, St Andrews, NB, to F.B. McKinnon, Regional Supervisor, Indian Affairs Branch, Amherst, NS , January 25, 1968, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, pp. 344-45).

1. Before 1963 the physical and biological characteristics of Eel River Cove seem to have been changing slowly – so slowly as to create the impression that the cove was a stable system. Since 1963 the tempo of change has increased rapidly. Evidence of extensive sedimentation is conspicuous from the 1967 general survey – coarse sediments are depositing in the extreme north and south ends and the mouth of the cove is being choked with gravel. At both ends salt marsh plants are appearing on the clam flats. Fine sediments are depositing in the middle reaches of the cove where formerly-firm soils are becoming very soft. The cove is behaving as a sediment trap and slowly converting to a salt marsh. In the north, the area of flats suitable for clam stocks is decreasing. And the rest of the cove's productive clam ground is deteriorating as a clam habitat, because of silt deposition.

2. These changes are traceable to damming which has greatly shortened the estuary and forced changes in behaviour of tides. The ebb and flood phases of the tidal cycle have been shortened and the high-slack and low-slack phases have been lengthened. This favours heavier sedimentation in the cove by allowing more sediments to deposit out during the high-slack phase and reducing the proportion of the deposited silt that is flushed out of the cove during the following ebb phase.

3. Flats have been exposed at low tide since 1963 instead of always being covered by water as formerly. *Digging is easier and this has led to great increases in clam harvesting effort.* The annual harvest was high immediately after damming (1964 and 1965) because accumulated stocks were being exploited and fishing effort has remained high. *As a result the volume of the standing crop of marketable clams (more than 2" long and 6 or more years old) has decreased 63% since 1963. Besides this the size-composition of the stock has changed. Marketable clams now constitute only 19% (by count) of the total population compared with 35% in 1963 and 1964. Since 1965 the annual harvest has decreased but the number of diggers remains high – a typical symptom of an intense fishery.*

4. Decreases in marketable clam stocks and in landings are attributed partly to increased harvesting (removal) but mostly to smothering. Smothering is a well-known incidental effect of digging and is caused by deep burial of clams when diggers turn the ground and tramp the mud.

5. *With reduced abundance of marketable clams the effort required to dig a pail has increased. This does not discourage picnickers very much because they dig for recreation. But it does affect Indians who dig for income and as a result, their current charge for a pail of clams has risen from about $1.50 in 1963 to $2.00-$2.50 in 1967. They state that in spite of higher sale prices their income is less because clams are so scarce.*

6. The stock of young clams has also decreased in the important clam-producing sections of the cove. This is partly because, as a habitat for clams, the cove is deteriorating and partly because of smothering as described above. The prospect

is that the resource may continue to decline because of increases in smothering rates in the intense fishery.

7. Since 1963 and 1964 the centre of abundance of clam stocks has shifted appreciably from south to north, partly because of heavy harvesting in the south and partly because of poorer reproduction in the south. Clam production and landings in middle sections of the cove (where there is least evidence of sedimentation) seem to be suffering less than that in northern and southern parts.

8. Damming increased availability of marketable clams to diggers by exposing flats at low tide that were formerly covered by water at all phases of the tidal cycle. *Increased availability led to increased numbers of diggers and heavier harvesting (removal of stock) and to heavier mortality from smothering that is directly and indirectly traceable to damming. This is the first statement that the Fisheries Research Board, as arbiter, was asked to supply to the contracting parties.*

9. The early history of the Indian fishery in Eel River Cove is sketchy but there was general agreement on trends reported by many people and for more recent times we have reasonably firm data. These include Department of Fisheries statistics which seem to portray a faithful history. At the time these statistics seemed unacceptable to the Indian Band but without them we are without any clue but hearsay, as to what transpired. We were obliged to use them and we think they furnished information that can be useful to the contracting parties in reaching a fair settlement.

10. The tenor of terms of the contract implies that Indian fishermen are to be compensated for decreases ("losses") in their annual landings of clams. However, the contract specifies a formula for calculating compensation and this formula involves only total landings. There is no fixed size-relationship between total landings and Indian landings and use of the formula gives unrealistic results. *Because of this and other ambiguities we have derived four different measures of "losses", from which compensation could be calculated. Those that seem fairest are based on estimates of changes in annual landings by Indians.*

11. *Between 1963 and 1967 the Indians' average annual landings seem to have decreased by 56% from an estimated 2,062 pails before damming to 911 after damming.* This decrease could be used in calculating compensation but it disregards the fact that landings cannot be maintained at 1964-1967 average annual level. *The fairest settlement of all would seem to be compensation for the 70% decrease from pre-dam average annual landings by Indians (2,062 pails) to the 1967 Indian landings (620 pails). This is the second statement FRB was asked to furnish.*[126]

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[126] J.C. Medcof, Fisheries Research Board, Biological Station, St Andrews, NB, "Third Survey of Eel River Cove, N.B., Soft-Shell Clam (Mya arenaria) Population," November 1967 (ICC Exhibit 2, tab 20, pp. 38-41). Emphasis added.

The four methods for calculating the losses to the Eel River Band proposed by Dr Medcof are summarized below:

- Comparison of average annual landings before and after damming (212), multiplied by one-half (the then-current proportion of Indian landings to total landings) and then by seven years, resulting in a total reduction of 742 pails. Since the average annual landings were determined by using the "two bonanza years, 1964 and 1965," Medcof felt that this would not be a fair measure of damages because it was unlikely that clam diggers on the cove could "ever again make such heavy landings."
- Assuming that total annual landings remain the same as in 1967, compensation could be based on the decrease in total annual landings as a result of damming (963), multiplied by one-half (the then-current proportion of Indian landings to total landings) and then by seven years, resulting in a total reduction of 3374 pails. Medcof suggests, however, that this does not take into account the fact that the proportion of Indian diggers decreased from about 75 per cent in 1960 to about 33 per cent in 1967 because the number of non-Indian diggers increased significantly over this same period.
- Calculating compensation based on the decrease in total annual Indian landings (rather than one-half the decrease in total landings), multiplied by seven years, resulting in a total reduction of 8057 pails.
- Long-term average annual Indian landings (based on the 1967 Indian landings of 620 pails and the corresponding decrease of 1442 pails from predam landings), multiplied by seven, resulting in a total reduction of 10,094 pails.[127]

Dr Medcof concluded that the last formula (which when multiplied by $1.50 per pail would have produced a figure of $15,141 total compensation for losses to the Band's clam harvests) was most consistent with the terms agreed to between the Band and the town.

Dr Medcof submitted a copy of his report to Dr J.M. Anderson, Director of the Fisheries Research Board, on December 22, 1967, along with a detailed memorandum setting out his thoughts on the interpretation of the draft agreement between the town and the Band. He did not think that the memorandum was appropriate to include in the report itself, but he hoped it might be of assistance "in clarifying the highly complex and somewhat confused Eel River Cove clam problem."[128] It is significant that Dr Medcof also sent a confidential copy of his memorandum with his personal views on the draft agreement to McKinnon for his review and comments. Under the heading "General View," Dr Medcof's memorandum states:

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[127] J.C. Medcof, Fisheries Research Board, Biological Station, St Andrews, NB, "Third Survey of Eel River Cove, N.B., Soft-Shell Clam (Mya arenaria) Population," November 1967 (ICC Exhibit 2, tab 20, pp. 31-35).

> Viewed objectively, this contract seems to favour interests of the Town of Dalhousie more than those of the Indian Band in three ways: (1) The Town was to get an advantage and benefit; the Indian Band was to get only conditional compensation for possible losses. (2) The town's benefit was to be indefinitely continuing; the Indians' compensation was to be partial and was to cover only seven years' possible losses. (3) The dollar value of the town's investment in the dam would be expected to increase when dollar values of real estate increased, whereas the per-pail price for clams ($1.50) was fixed in the terms of the contract.
>
> In 1963 nobody foresaw how great and long-lasting the effects of damming would be. Now we have seen the effects. There were losses and they seem likely to continue indefinitely – not just for seven years. We realize now that the risk the Indian Band took was very real. We also realize that the terms of the contract, even when interpreted most generously, provide incomplete compensation. This is the value of 10,094 pails of clams valued at $1.50/pail. This compensation price is fixed in the contract but the current average price of clams after only four years has increased by 50% to $2.25.
>
> . . . The Indian Band's annual clam fishery has long been a source of both income and food and it has been reduced by an estimated 70% for an indefinitely continuing period. The contract says nothing about loss of the food resource and they promise to compensate for income losses for a 7-year period only.

Further on he continues:

> Because of these seeming inequities I would suggest that before the contract is settled, the contracting parties consider adopting modified terms that would not appear to favour one party more than the other . . .
>
> *I would suggest that, as Canadians, the Indian Band should qualify not for mere compensation for losses to the end of 1972, but for a true and lasting sharing with the Town of Dalhousie of total benefits that have arisen from building the dam on the reserve land.*[129]

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[128] J.C. Medcof, Fisheries Research Board, Biological Station, St Andrews, NB, to J.M. Anderson, Director, Fisheries Research Board, Biological Station, St Andrews, NB, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 324).

[129] J.C. Medcof, Fisheries Research Board of Canada, Biological Station, St Andrews, NB, to F.D. McKinnon, Regional Supervisor, Indian Affairs Branch, NS, December 22, 1967, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, pp. 324-31). Emphasis added.

Although Dr Medcof acknowledged that a number of practical suggestions could be advanced to address the apparent inequities of the draft agreement, he suggested two options in particular: the establishment of a fund that would earn the Band about $4000 per year in interest to offset dwindling values of the dollar; and the town to pay an annual sum of money to the Band based on the annual loss of 1442 pails of clams.

NEGOTIATIONS TO FINALIZE THE TERMS OF THE AGREEMENT: PHASE 3 (1968-70)

McKinnon wrote to Dr Medcof on January 9, 1968, to inform him that he agreed entirely with his views. He noted that although the Band was reluctant to allow the town to construct the dam when it was first proposed, members felt that this would create regular employment in local industry and a "great deal of trust was therefore placed in the Town officials." McKinnon added that, "[a]s the matter stands, there is *no agreement*, the Town has no . . . permission to occupy the part of the reserve, and technically the Indians could insist that the dam be removed." Despite being unable to conclude an agreement on compensation because of the lack of information on the dam's effect on the fishery, McKinnon noted that there were rumours that the town would be seeking to increase the capacity of the reservoir, in which case the Band could find itself "in a very strong position not only to dictate the terms of a new agreement, but also to ensure that they are reasonably compensated for the initial action of the Town."[130]

On February 15, 1968, the NBWA suddenly reappeared when it informed Indian Affairs that a proposal was underway to acquire an additional 82 acres of reserve land by early spring to increase the water storage capacity of the reservoir. The NBWA would also require a waterline right of way of less than 2 acres to construct a second pipeline next to the existing one to pump additional water from the Eel River for the New Brunswick Electric Power Commission's thermal plant. Accordingly, the Director of the NBWA, J.G. Lockhart, requested advice on what steps should be taken to enter into negotiations with the Band either to purchase or arrange an exchange for the land required for the project. The project, which apparently did not involve the town, was to be financed by the Atlantic Development Board and owned by the province.[131]

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[130] F.B. McKinnon, Regional Supervisor, Maritime Regional Office, Amherst, NS, to J.C. Medcof, Assistant Director, Fisheries Research Board, Biological Station, St Andrews, NB, January 9, 1968, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 343). Emphasis in original.

On March 21, McKinnon confirmed that he had discussed the matter further with Lockhart, who had not been advised by Mayor Arsenault that previous commitments to the Band by the town were still outstanding. In view of the fact that the Band had not yet agreed to terms for previous flooding, Lockhart informed McKinnon that "the Province would likely take over the negotiations with the band council for the settlement of all claims and for permission to enlarge the reservoir."[132] J.H. MacAdam, the Deputy Administrator of Lands, IAB, responded to McKinnon's letter, stating that "it should be made clear to the Authority that there can be no further commitment of land on this Reserve until settlement has been made for the land already given to them."[133]

Accordingly, Caissie wrote to Lockhart on April 4, 1968, expressing concern with the fact that local newspapers had reported that the province approved a request for funding to allow the Atlantic Development Board to proceed with additional development on the Eel River reservoir:

> I am a bit concerned that the Indians may not appreciate the fact that the decision to proceed with this work has been made public and there has yet to be official permission granted by the band for the use of reserve land. The longer this is delayed, the greater may be the difficulties to reach an amicable settlement.
>
> As it was indicated in your office [by Caissie and Sheane], negotiations between yourself and the Band should be undertaken at the earliest possible moment. Otherwise, your construction schedule may suffer. *I should like to point out, again, that because of a number of difficulties which have arisen in the past over use of Indian land, the Department has taken the attitude that no use of reserve land for any kind of development will be permitted until a full settlement has been reached.*[134]

In closing, Caissie stated in no uncertain terms that there "must be full settlement of the initial claim before additional development will be permitted."

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[131] J.G. Lockhart, Director, New Brunswick Water Authority, Fredericton, NB, to F.B. McKinnon, Regional Supervisor, Indian Affairs Branch, Department of Citizenship & Immigration, Amherst, NS, February 15, 1968, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 349).

[132] F.B. McKinnon, Regional Director of Indian Affairs, Maritime Regional Office, Amherst, NS, to Indian Affairs Branch, March 21, 1968, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, pp. 350-51).

[133] J.H. MacAdam, Administrator of Lands, to Regional Director, Maritimes Regional Office, Department of Indian Affairs, April 2, 1968, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 352).

[134] V.J. Caissie, Regional Superintendent of Development, Maritimes Regional Office, Department of Indian Affairs, to J.G. Lockhart, Director, New Brunswick Water Authority, April 4, 1968, DIAND file 271/31-5-13-3-1, vol. 2. The original is not in the ICC Documents, but a transcript is provided in ICC Exhibit 4, p. 167. Emphasis added.

He requested a response on whether the NBWA would assume the town's liability with respect to the initial claim.

On April 24, 1968, the Director of Indian Affairs, J.W. Churchman, briefed Assistant Deputy Minister of Indian Affairs Battle on recent developments. He suggested that, although negotiations had been delayed for some time, it would be worth awaiting the NBWA's position on whether it would undertake the town's responsibilities to compensate the Band for land taken and for damages caused by the dam before resuming negotiations. "[T]he Water Authority may prove to be more tractable than the Town of Dalhousie officials," he wrote, "and in any event, the fact that their original claim for compensation remains unresolved will strengthen the Band Council's bargaining position concerning the additional land required at this time."[135] The local IAB officials confirmed that negotiations would be put on hold pending the outcome of discussions between the town and the NBWA on who would be responsible for finalizing an agreement. In any event, Caissie reported, "*the Band Council have indicated that they intend to drive a hard bargain with whomever negotiations are resumed* [with]."[136]

Handwritten notes of various meetings between the Band and other parties in May, June, and July 1968 were provided to the Commission by Wallace LaBillois, who was a Band Councillor at the time of these negotiations.[137] These notes, although sketchy, provide an important insight into the Band's perspective on the negotiations that took place from 1963 to 1968. On May 1, 1968, LaBillois chaired a meeting between the town, the NBWA, the IAB, and representatives of the Band. He noted in this meeting that since the "original meeting that took place in 1963 a total of 10 meetings had taken place and each of these meetings had been called by the Indians. He said that so far as the Indians of Eel River Bar was concerned it was evident that they had taken the initiative and had made every attempt to make the agreement a workable one." After LaBillois stated that town officials "had done little or nothing to try and live up to any parts that were written into the agreement," Mayor Arsenault said "that it was almost impossible to go by the old agreement" because the town could not convince any business or union that it "must hire Indians."[138] Councillor LaBillois summarized his views on the extent of the Band's losses and suggested a compensation package, which he calculated as follows: (1) $220,000 for losses in smelts, based on 11 nets multiplied by $1000 per net multiplied by 20 years; (2) $1.2 million for the complete loss of the clam fishery, based on 20,000 buckets at $3.00 per bucket multiplied by 20 years; and (3) additional compensation for losses of revenue from salmon and angling sport in the Eel River and "fowling."[139]

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[135] J.W. Churchman, Director, Department of Indian Affairs, Ottawa, to Assistant Deputy Minister, Department of Indian Affairs, April 24, 1968, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, pp. 353-54).

[136] J. Wilkins, Department of Indian Affairs, memo to file, April 26, 1968, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 355). Emphasis added.

[137] Minutes of meetings (ICC Exhibit 3).

[138] Minutes of meetings (ICC Exhibit 3, p. 1).

Councillor Wallace LaBillois chaired another meeting held on the Eel River reserve on May 23, 1968, with only the Band Council and representatives of the town in attendance. The notes of this meeting indicate that Mr LaBillois reviewed the minutes of the last meeting and stated that the Band had requested $900,000 in compensation based on $30,000 multiplied by 30 years. Mr LaBillois then said that, "after thinking over their losses," the Band was now increasing its proposal to $50,000 for 50 years, for a total of $2.5 million, as compensation for losses to the clam and other fisheries. He also stated that the Band Council would be prepared to exchange land, so the town agreed to consider land prices and report back on this option. LaBillois asked that "it be written in the agreement that every effort be made to get employment for the Indians."[140]

On June 4, 1968, another meeting was held between the Band Council, the NBWA, and the town officials, but it is difficult to discern from the notes who was proposing what. The notes do suggest, however, that there was some discussion over the following elements of a proposed compensation package: $500,000, or $10,000 per year for 50 years; approximately 350 acres of land in exchange for 82.3 acres required for the reservoir, or $15,000 in lieu of land; access to water for fishing, hunting, and trapping; and one-half cent for every 1000 gallons of water pumped out of the reservoir for a period of 20 years, at which point the rate could be renegotiated.[141]

On June 21, 1968, another compensation package was proposed during a meeting between the Band Council, the NBWA, and the IAB, but again it is not clear from the notes who was proposing what. The main elements of this proposal were $23,000; $200 per acre; $18,000 to be realized for clearing the land along the reservoir and the International Paper Company pipeline right of way; expenses; sluice gates to be turned over to the parks department; 325 acres of land, to be received within 30 days after execution of agreement; and one-half cent per 1000 gallons pumped, with a $25,000 minimum allowing up to 15 million gallons.[142]

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[139] Minutes of meetings (ICC Exhibit 3, p. 3).
[140] Minutes of meetings (ICC Exhibit 3, p. 5).
[141] Minutes of meeting, June 4, 1968 (ICC Exhibit 3, p. 8).

On August 20, 1968, the Eel River Band Council passed a resolution instructing the Minister of Indian Affairs to issue a one-year permit to the Province of New Brunswick, as represented by the Department of Natural Resources, "to enter on our reserve in order to carry out certain works in connection with a dam, water lines and allied works" until a formal agreement could be negotiated between the Band and the NBWA and signed by the Department of Indian Affairs and the province. Attached to the Band Council Resolution as Document A was a "Memorandum Respecting Points Agreed upon Between the New Brunswick Water Authority and Members of the Eel River Band Council" (Memorandum of Agreement).[143] The preamble to the Memorandum of Agreement states that the dam was erected in a manner that encroached on lands of the Eel River Band and that, as successor in title and interest to the Town of Dalhousie for the operation and maintenance of the dam, the NBWA intended to raise the water level of the reservoir, but "wishes to compensate the Band for damages and losses suffered by the Indians as a result of the erection of the dam and creation of the headpond by the Town of Dalhousie and to further compensate the Band for losses and damages that may be suffered as a result of the raising of the water level to 9 feet geodetic elevation."[144] In addition to flooding more reserve land by raising the water level of the headpond, the NBWA also required land for the road leading to the headpond and a strip of land adjacent to the existing International Paper Company pipeline to establish another pipeline and pumphouse. For its part, the Band agreed to take all necessary steps to arrange for an absolute surrender of the lands as soon as possible.

With respect to compensation and other key terms, the NBWA and the Band agreed to the following:

(1) 260 acres (referred to as the "LeBlanc-Arsenault property") in exchange for the absolute surrender of approximately 82 acres, or payment of $15,000 in lieu of the land;

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[142] Minutes of meeting, June 21, 1968 (ICC Exhibit 3, pp. 9-11).

[143] Eel River Band Council – Miramichi Agency, Eel River, NB, August 20, 1968, Band Council Resolution (ICC Documents, pp. 356-62).

[144] Memorandum of Agreement, August 20, 1968 (ICC Documents, pp. 357-58).

(2) an annual sum calculated at the rate of one-half cent per 1000 U.S. gallons pumped from the headpond and Eel River to be paid to the Band "due to their loss of revenue and benefits caused by the erection and operation of the Eel River Dam and in particular due to the loss of revenue and benefits from the clam, salmon and smelt fishery and the reduction in migratory birds and other natural resources";

(3) with respect to water pumped, the NBWA to pay a minimum of $10,000 per year, unless the volume of water pumped is less than 1825 million U.S. gallons per year, in which case the Band shall be paid according to the formula;

(4) the amounts payable for water pumped to remain in effect for a period of 20 years, at which time the amounts payable to be subject to review and negotiation by the parties and to be reviewed every five years after that;

(5) the Band to have access to the headpond to the extent that the NBWA had authority to provide such permission;

(6) the NBWA to enter into a contract with the Chief of the Band for the sum of $18,000 to clear the approximately 82.4 acres of land required to increase the water level of the headpond;

(7) if the NBWA should cease to operate the Eel River water supply system, the Band to have the first opportunity to purchase the lands; and

(8) the NBWA and its employees to have a right of access to the reserve for the purposes of inspecting, constructing, maintaining, and repairing the Eel River headpond, dam, and water supply system.

This Memorandum of Agreement was signed by Chief Alfred Narvie, Councillors Wallace LaBillois and Mrs Wallace (Lillian) LaBillois, and by two officials of of the NBWA, Chairman E.S. Fellows and Director Lockhart.[145]

The following day, Caissie sent a memorandum to IAB-Ottawa, attaching a copy of the Memorandum of Agreement for review. Caissie noted that shortly after having a telephone conversation with MacAdam about the proposed agreement between the Band and the NBWA, "Councillor Wallace Labillois

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[145] Memorandum of Agreement, August 20, 1968 (ICC Documents, pp. 357-58).

[sic] called to indicate that they were anxious to sign this agreement as soon as possible and could I please go up for Tuesday, August 20." Caissie confirmed that he and the Superintendent of the Miramichi Indian Agency, R.M.J.J. Guillas, attended on behalf of the IAB and that the parties signed the agreement at that meeting. Caissie indicated that some points might require clarification. In particular, he noted that the term providing for compensation for water pumped would not compensate the Band for water already pumped, but "[t]his is well understood, and is acceptable to the Band." Caissie also questioned whether the release clause could bind all Band members. Finally, he suggested that the section providing for a right of first option to purchase the flooded lands if they were no longer required by the NBWA should be made more clear in the final agreement.[146]

On September 9, 1968, McKinnon and other IAB officials from the Miramichi Agency met with the Chairman and Director of the NBWA along with P.A. MacNutt, solicitor for the NBWA, to discuss key points of the agreement and possible amendments. McKinnon questioned whether the NBWA had authority to expropriate land and was advised that, although the NBWA lacked such authority, the province did have such powers. McKinnon also expressed concerns about transferring administration and control over all the land required by the NBWA:

> The question of transferring control and management for the flooded land, and of a lease only for the pipeline right-of-way, was mentioned, and there was some hesitation on the part of the Water Authority to accept this. I indicated to them, however that this was merely a suggestion, and that there might be some other solution to it, but that we would not grant all the land involved here and face the future possibility of the Province refusing to pay as per the formula agreed upon on the arguments that the Indians were neither the owners of the water or the clams.[147]

McKinnon also expressed concern that the release for future damages be carefully reviewed:

> I got the impression . . . that they [the NBWA] intended this Section to provide them with a release against claims by an Indian for, say, damage to his house due to the raising of the water table in the area. There is no likelihood that this kind of damage

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[146] V.J. Cassie, Regional Superintendent of Development, Maritime Regional Office, to Indian Affairs Branch, August 21, 1968, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, pp. 363-64).

[147] F.B. McKinnon, Regional Director, Maritime Regional Office, Indian Affairs Branch, Amherst, NS, to H. MacAdam, Indian Affairs Branch, September 12, 1968, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, pp. 370-71).

> would occur, since most of the houses are well below the dam, but I don't think that we should free the Water Authority from any future possible damages to private property.[148]

McKinnon added that he had asked the Band Council to pass a Band Council Resolution permitting the Minister to exercise his powers under section 35 of the *Indian Act* to expropriate lands to be flooded.

On September 12, 1968, the Band Council passed a resolution requesting that "Section 35 of the *Indian Act* be applied to grant land to the New Brunswick Power Authority."[149] When McKinnon forwarded the Band Council Resolution to the IAB for approval, he added that certain matters should be included in the preamble to any agreement, including the Band's "moral entitlement" to the clams and water and recognition of the fact "that all parties are cognizant of the desire of the Indians to secure employment to offset the losses from exploitation of natural resources, and all will exercise whatever influence they have to fill that desire."[150]

The draft agreement was then submitted by the Deputy Minister of Indian Affairs, J.A. MacDonald, to the Minister of Indian Affairs, the Hon. Jean Chrétien, for approval, with a recommendation that the Department grant a permit under section 28(2) of the *Indian Act* authorizing the commencement of construction and operation of the dam by the NBWA for a period of one year. Indian Affairs apparently had some concerns about the proposed terms of the agreement, which provided for a release of the town and the NBWA from liability for all damages "which heretofore has been or hereafter may be sustained as a result of" the dam. When it was submitted to Minister Chrétien for approval, however, the Deputy Minister stated that the payment of $25,000 was intended to compensate the Eel River Band "for any damages sustained as a result of the earlier use of the land by the Town without agreement," and there was no mention at all of future damages.[151] It is also important to note that Indian Affairs did not intend to seek a surrender from the Band as proposed in the Memorandum of Agreement; rather, the Department would use the one-year period "to seek the authority of the Governor in Council under the provisions of Section 35 of the [*Indian Act*] to grant Letters Patent for the lands required in favour of the Water Authority. In conjunction with this action the Branch would draft a permit for use of the water pipeline for a term of twenty (20) years for consideration based on the gallonage of water pumped through it."[152] The document indicates that Minister Chrétien gave his approval to issue a section 28(2) permit to the NBWA pending final settlement of the terms with the Band.

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[148] F.B. McKinnon, Regional Director, Maritime Regional Office, Indian Affairs Branch, Amherst, NS, to H. MacAdam, Indian Affairs Branch, September 12, 1968, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 371).

[149] Eel River Band Council, Band Council Resolution, September, 12, 1968 (ICC Documents, p. 373).

[150] F.B. McKinnon, Regional Director, Maritimes Regional Office, Amherst, NS, to Indian Affairs Branch, October 3, 1968, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 374).

[151] J.A. MacDonald, Deputy Minister, Indian Affairs Branch, Ottawa, to Jean Chrétien, Minister, Department of Indian Affairs, September 10, 1968, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 368).

It appears from a November 20, 1968, letter from McKinnon to Lockhart that the solicitor for the NBWA, MacNutt, was to contact MacAdam, Administrator of Lands at IAB-Ottawa, to prepare the terms of the final agreement for the Minister's signature. The NBWA was also expected to contact the Surveyor General immediately for instructions on an acceptable survey plan to avoid any delay in concluding the agreement. Since there had been no response from MacNutt or the NBWA, McKinnon wrote to Lockhart to find out what was delaying their discussions.[153] A month later, Lockhart responded that discussions with the Ottawa office had been opened by MacNutt and that a survey plan had been submitted to the Surveyor General for approval. This letter was the first of many written on behalf of the NBWA apologizing for various delays.[154] Just four days earlier, the Surveyor General had written to the NBWA to advise that its survey plan was not acceptable and that survey instructions would be sent after all relevant information had been collected.[155]

On January 3, 1969, MacNutt responded to what he described as "a slight misunderstanding between myself and Mr. MacKinnon [sic] at our meeting in September of 1968 concerning the Water Authority's acquisition of certain lands on the Eel River Indian Reserve."[156] McKinnon had raised three points of particular significance: (1) that the annual payment for water pumped out of the Eel River should be based on "a more material form of consideration than the clam and fishing rights"; (2) that the annual payment should be based on a lease of the pipeline right of way rather than granting outright ownership to the NBWA; and (3) that the NBWA should seek to expropriate the land required rather than proceeding with the formal procedures for surrender. MacNutt responded to these comments as follows: (1) the agreement referred to clam and fishing rights because "the Indians would be most uncooperative if there was not specific compensation for the loss of these rights regardless of the existence of those rights"; (2) the NBWA preferred to have an "absolute transfer of the fee" with respect to the pipeline right of way, rather than leasing this interest; and (3) the NBWA preferred to expropriate the land under the authority of the provincial *Expropriation Act*. MacNutt also expressed some trepidation with renegotiating the Memorandum of Agreement without the Band's direct involvement:

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[152] J.A. MacDonald, Deputy Minister, Indian Affairs Branch, Ottawa, to Jean Chrétien, Minister, Department of Indian Affairs, September 10, 1968, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 369).

[153] F.B. McKinnon, Regional Director, Maritime Regional Office, Amherst, NS, to J.G. Lockhart, Director, New Brunswick Water Authority, Fredericton, NB, November 20, 1968, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 378).

[154] J.G. Lockhart, Director New Brunswick Water Authority, Fredericton, NB, to F.B. McKinnon, Regional Director, Maritime Regional Office, Amherst, NS, December 23, 1968, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 382).

[155] R. Thistlethwaite, Surveyor General, Surveys & Mapping Branch, Department of Energy, Mines and Resources, Ottawa, to C.J. Garland, Project Engineer, New Brunswick Water Authority, Fredericton, NB, December 19, 1968, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 380).

[156] P. MacNutt, Solicitor, Department of Justice, NB, to J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, January 3, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 384).

> Note that the memorandum was based on negotiations directly with the Band and I am not sure as to how far we can now go in altering the basis on which we negotiated the memorandum. In other words are you required to abide by the Band's decisions or is it possible for you to sway their approach so that we might more efficiently bring the memorandum into effect.[157]

On January 9, MacAdam responded to MacNutt by stating: "Inasmuch as this Agreement was negotiated by the Eel River Band Council, I have forwarded the proposed changes to the Council through Mr. McKinnon, for its reaction and consents. Any changes must be acceptable to the Indians before this Department can take any action to deal with the land."[158] On the same day, MacAdam wrote a memorandum to McKinnon stating his views on the Memorandum of Agreement; in particular, he stressed the importance of the Band having a "firm option" to acquire the lands if they are no longer required for the present purpose, and he noted that a Band Council Resolution already accepted the use of expropriation authority under section 35 of the *Indian Act*.[159] On January 14, MacNutt responded to MacAdam and expressed concerns about the fact that his suggested revisions were forwarded to the Band; he did not want to have to renegotiate the "whole of the understanding," but intended to address Band members' concerns in the technical wording of the agreement to be used to effect the transfer of lands and the payment of compensation. Accordingly, he asked MacAdam to

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[157] P. MacNutt, Solicitor, Department of Justice, NB, to J.H. MAcAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, January 3, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 386).

[158] J.H. MacAdam, Administrator of Lands, to P. MacNutt, Solicitor, Department of Justice, Fredericton, NB, January 9, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 393).

[159] J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, to Regional Director, Maritime Regional Office, Department of Indian Affairs, January 9, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 394).

"please not submit the proposed changes to the Council and advise me how far we can go in streamlining the documentation required."[160] The IAB continued to negotiate with the NBWA directly, on behalf of the Band, and, despite MacNutt's request, the IAB also continued to seek the Band's approval of changes to the original memorandum.[161]

On February 4, 1969, McKinnon wrote to MacAdam requesting that they seek further clarification from the province before asking MacNutt to prepare the draft agreement. In particular, McKinnon was quite concerned about transferring title to the lands outright to the province, particularly in relation to the parcel required for the pipeline. McKinnon wrote that although he was not a lawyer,

> I fail to detect in Mr. MacNutt's letter of January 3, 1969 any assurance whatsoever that at some future date someone in authority in the Province, or the courts, might not rule that this agreement is invalid because the Indians did not have the legal rights to the clams or the water and could not demand what appears to be an exorbitant settlement. In your letters, you appear to go along with the idea that a title to the land could be transferred to the Water Authority, in some final form. I appreciate the difficulty that the Water Authority may have because of the requirements imposed by the A.D.B. [Atlantic Development Board], but we must ensure that the full intent of this agreement is respected. *It is obvious that the Province is paying for damage to clams and for the water. If this is the way the agreement reads, then what protection will the Indians have against this agreement being invalidated at some future date because the Indians do not have any legal rights to the clams and the water? You mentioned to me at one time that we needed a hook on which to hang our hats. It seems to me that the hook will disappear if the agreement is written in the form in which the Province wants it written.*[162]

It is apparent from the exchange of correspondence on this subject that McKinnon and virtually everyone other than members of the Band were operating under the assumption that the Band did not have any special claim or treaty rights to clams and other marine resources affected by the dam. Nevertheless, it was also obvious that the NBWA intended to provide compensation for damage to the Band's fishery (whether or not the Band did have recognized fishing rights), and McKinnon was seeking ways of ensuring that the Band retained some interest in the land to justify the payment of compensation to the Band and to ensure that the NBWA complied with the intent of the agreement.

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[160] P. MacNutt, Solicitor, Department of Justice, Fredericton, NB, to J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, January 14, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 395).

[161] For instance, see F.B. McKinnon, Regional Director, Maritime Regional Office, Indian Affairs Branch, Amherst, NS, to J.G. Lockhart, Director, New Brunswick Water Authority, Fredericton, NB, May 8, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 417), where McKinnon confirms that a copy of the draft agreement was sent to the Eel River Band Council for their comments before final approval was given by Ottawa for execution of the document on behalf of the Band.

[162] F.B. McKinnon, Regional Director, Maritime Regional Office, Indian Affairs Branch, Amherst, NS, to Indian Affairs Branch, Ottawa, Ontario, February 4, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 399). Emphasis added.

MacAdam apparently agreed with McKinnon's concerns because, on February 18, 1969, he wrote that the land required for flooding would be transferred to the Province of New Brunswick by Order in Council under the authority of section 35 of the *Indian Act*, but "land for the pipeline and access was to be granted by an easement for as long as required for purpose intended subject to payment based on the rate of ½ cent per 1,000 U.S. gallons."[163] In addition, $15,000 would be paid to the Band in lieu of an exchange for the land required for flooding, and $25,000 would be provided in exchange for "a general release of all other damages sustained by the Band, as a result of the flooding." MacAdam instructed McKinnon to use this memo to expedite his discussions with the Band Council and the NBWA.

Meanwhile, the Band was concerned over the delay and suggested that "interest be payable on the monies unless the matter is settled shortly." Caissie agreed to mention this suggestion to the NBWA and to travel to Eel River to "discuss the possibility of the Band constructing cottage buildings on the lands fronting the water."[164]

On April 8, 1969, MacNutt sent a draft agreement to MacAdam for his comments. McKinnon provided his comments to MacAdam on April 11, indicating that the NBWA had covered all the points discussed, but disagreed with transferring administration and control of the parcels required for the pipeline, pumphouse, and access road to the province:

> It is proposed that the land required for the pipe line and the pumphouse be covered under an easement, but that the land under the road leading to the dam be part of those lands which it [sic] to be covered by a transfer of administration and control. It was always our understanding that the road would also be covered by an easement and this would ensure to the band, utilization of this road without any interference from the New Brunswick Water Authority, providing, of course, that the band would not either interfere with the Water Authority making use of that access road. . . . This is extremely important because the band is proposing to develop the shore of the lake

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[163] J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, to F.B. McKinnon, Regional Director, Maritime Regional Office, Indian Affairs Branch, Amherst, NS, February 18, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 401).

[164] Author unknown, to V.J. Cassie, Superintendent of Development, Maritime Regional Office, March 5, 1969, DIAND file, 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 403).

> created by the dam for the marina and for cottage sites and it will be, of course, absolutely necessary that the band provide access to that development.[165]

When MacAdam returned the draft agreement to MacNutt with his comments, McKinnon's concerns were reflected in the proposed changes. MacAdam, therefore, maintained that the Band would grant an easement with respect to the pipeline, pumphouse, and access road rather than transfer the lands to the NBWA. He also wrote:

> Since . . . it is the intention of the Authority to compensate the Eel River Band of Indians for damages and losses suffered as a result of the erection of the Dam and creation of the headpond by the Town of Dalhousie and to further compensate them for damages sustained in raising the water level to nine feet geodetic elevation, and [the release clause] implies that the compensation of $25,000 included future damages sustained by the Eel River Band of Indians, it is suggested that the paragraph should be amended to more clearly define the intent outlined by the 5th recital. I am of the opinion that it should be amended as follows: . . . "may be sustained in consequence of the erection of the Eel River Dam, Eel River water supply system and the Eel River headpond."[166]

MacAdam also pointed out that the clause regarding access by NBWA workers on the reserve to service the dam appeared to allow unrestricted access to the entire reserve, and that it should be rewritten to provide for "access subject to approval by the Band Council."[167]

When these proposed changes were submitted to the Band Council for its approval, Councillor Wallace LaBillois informed the IAB that, "since the delay in the execution of this agreement is not of the band's making, and neither is it entirely due to the action of this Department, the payment should be made for the water which is now being pumped."[168] The NBWA had apparently started pumping water about a week previously, at about 500 gallons per minute. In submitting this proposal to the NBWA, Caissie also noted that

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[165] F.B. McKinnon, Regional Director, Maritime Regional Office, Indian Affairs Branch, Amherst, NS, to J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 405). J. Wilkins also expressed his general agreement with the draft agreement and suggested that it be approved as satisfactory and returned to the Band Council and the NBWA for execution (ICC Documents, p. 406).

[166] J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, to P. MacNutt, Solicitor, Department of Justice, Fredericton, NB, April 21, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 411).

[167] J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, to P. MacNutt, Solicitor, Department of Justice, Fredericton, NB, April 21, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 411).

[168] F.B. McKinnon, Regional Director, Maritime Regional Office, Indian Affairs Branch, Amherst, NS, to J.G. Lockhart, Director, New Brunswick Water Authority, Fredericton, NB, May 8, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 417).

LaBillois stated that the "band hopes to assume shortly the management of all their affairs, and they would like to receive for their records an original of the agreement."[169] Caissie noted in a later memorandum that a copy of the provisional plan was satisfactory and that the matter would also be discussed with the Band later that week.[170]

On July 17, 1969, MacNutt wrote to MacAdam to advise that the NBWA would not agree to any changes with respect to either paragraph 8, respecting payment of $25,000 in exchange for a release for all past, present, and future damages caused by the dam, or paragraph 11, respecting unrestricted access to the headpond without prior approval of the Band Council.[171] MacNutt also wrote McKinnon on the same day informing him that the NBWA was not prepared to pay for pumping operations currently being carried out, as they were not "normal pumping operations" as understood in the draft agreement. An extra copy of the draft agreement, which MacNutt hoped would be the final draft, was enclosed for Wallace LaBillois, who had requested that a copy be forwarded to him.[172] In view of MacNutt's unwillingness to change the agreement, MacAdam wrote to McKinnon on July 22 stating that the IAB would not insist on any amendments unless McKinnon or the Band Council objected.[173] On July 29, Caissie provided the following comments to MacAdam, with the caveat that he was not a lawyer: (1) the annual payment for water pumped should be based on annual, not daily, consumption; (2) paragraph 11 respecting access should require prior approval of the Band to prevent the NBWA from gaining access "all over the reserve for all sorts of purposes without having to pay additional compensation for damages caused by such activities"; and (3) paragraph 8 was unsatisfactory because the Band did not intend to give the NBWA unlimited permission theoretically to "go over the reserve and in the process of carrying out repairs, bulldoze through existing lands without having to pay any compensation . . . for damages caused by such activities."[174] Finally, he noted that the Band Council was displeased with the fact that the NBWA did not intend to pay for water being presently pumped.

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[169] F.B. McKinnon, Regional Director, Maritime Regional Office, Indian Affairs Branch, Amherst, NS, to J.G. Lockhart, Director, New Brunswick Water Authority, Fredericton, NB, May 8, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 417).

[170] V.J. Caissie, Superintendent of Development, Maritime Regional Office, to Director, Indian Eskimo Economic Development, June 4, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 420).

[171] P. MacNutt, Solicitor, Department of Justice, Fredericton, NB, to J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, July 17, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 424).

[172] P. MacNutt, Solicitor, Department of Justice, Fredericton, NB, to F.B. McKinnon, Regional Director, Maritime Regional Office, Indian Affairs Branch, Amherst, NS, July 17, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 431).

[173] J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, to F.B. McKinnon, Regional Director, Maritime Regional Office, Indian Affairs Branch, Amherst, NS, July 22, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 432).

On August 6, 1969, the Assistant Superintendent of the Miramichi Indian Agency, H.W. Hennigar, attended a meeting at Eel River to discuss the draft agreement.[175] In a memorandum prepared by Hennigar the next day, he confirmed that certain clauses of the agreement were not acceptable to the Band Council. With respect to paragraph 7, the Band Council also understood that the pumpage fee of one-half cent per 1000 gallons of water was to be based on annual and not daily consumption. Paragraph 8 was not satisfactory because it would not protect the Band's "properties in future years should any disaster occur" and, therefore, it should be reworded to confine the release to those damages caused by the "erection of the Eel River Dam, Eel River Water Supply System and the Eel River headpond."[176] Finally, the Band Council also did not accept paragraph 11 and suggested that it limit the NBWA's access "for the purpose of inspecting, maintaining, and repairing the Eel River headpond, dam, and water supply system over the access road leading to the Eel River Headpond, dam and water system." The Band Council's position was communicated to MacNutt in a memorandum from MacAdam on August 20, 1969, along with suggested wording to address their concerns.[177]

On December 3, 1969, MacNutt responded that the amendments requested with respect to both the pumping of water and the compensation for damages incurred as a result of crossing the reserve for inspection purposes had been approved by the NBWA. However, the NBWA was adamant that paragraph 8 not be changed, since it was "their understanding that the negotiations were conducted on the basis that the $25,000.00 would cover past, present, and future damages."[178] The NBWA took the position that $25,000 far exceeded the present purchase value of the land, on the understanding that it would cover past, present, and future damages. The Band and the Department, in contrast, had taken the position all along that the $25,000 was to compensate the Band for the unauthorized use of the land to construct the dam and for the loss of the fisheries.

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[174] V.J. Caissie, Acting Regional Superintendent of Economic Development, Maritime Regional Office, to J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, July 29, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, pp. 433-34).

[175] R.M.J.J. Guillas, Superintendent, Miramichi Indian Agency, to J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, August 8, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 437).

[176] H.W. Hennigar, Assistant, Miramichi Indian Agency, Department of Indian Affairs, to R.M.J.J. Guillas, Superintendent, Miramichi Indian Agency, Department of Indian Affairs, August 7, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 436).

[177] J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, to P. MacNutt, Solicitor, Department of Justice, Fredericton, NB, August 20, 1969, DIAND file, 271/31-5-13-3-1, vol. 2 (ICC Documents, pp. 438-39).

[178] P. MacNutt, Solicitor, Department of Justice, Fredericton, NB, to J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, December 3, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, pp. 444-45).

On January 23, 1970, Superintendent Guillas of the Miramichi Agency sought to arrange further meetings between Indian Affairs, the Band Council, and the NBWA to resolve these outstanding issues. Guillas advised that Wallace LaBillois, who was now the Band Manager, had informed him that he would arrange the meeting on the Eel River reserve and that he would be inviting persons "to attend this meeting to enable the Band to be protected and guided in formulating their last submission to be approved by our Legal Branch and the New Brunswick Water Authority."[179] Before the meeting could be set up, however, LaBillois called the Agency office to say that "he was in contact with Mr. E.S. Fellow, Chairman of the New Brunswick Water Authority, and between them they decided there was no need to hold further meetings, and that the Water Authority was to advise their solicitor to contact the Eel River Band and process the final documents for signature immediately." Guillas added that "[i]n view of this development we will not pursue this matter any further at this time but will leave it to the discretion of the Eel River Indian Band to pursue themselves, should they feel that finalization of these documents is not being processed within the limited time they have set for themselves."[180]

Although Guillas thought that the matter should be left to the Band's discretion to settle, H.T. Vergette, Acting Chief of the Indian Lands Division, disagreed with this approach. On January 30, Vergette wrote to C.T.W. Hyslop, the Acting Director of the Economic Development Branch, to advise that many issues remained outstanding, including the release clause, and, therefore, he was of the view that

> without firm and determined direction and assistance from our field and regional representatives, the matter will not be resolved for a further indeterminate period. There is a considerable sum of money involved here (in excess of $40,000) and so far as the Indians are concerned it has been under process in some form or another since 1963, without any apparent end in sight.[181]

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[179] R.M.J.J. Guillas, Superintendent, Miramichi Indian Agency, to J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, January 23, 1970, DIAND file 271/31-5-13-3-1, vol. 3 (ICC Documents, p. 446).

[180] R.M.J.J. Guillas, Superintendent, Miramichi Indian Agency, to J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, January 23, 1970, DIAND file 271/31-5-13-3-1, vol. 3 (ICC Documents, p. 446).

[181] H.T. Vergette, Acting Chief, Lands Division, Economic Development Branch, Department of Indian Affairs, Ottawa, to C.T.W. Haylop, Acting Director, Department of Indian Affairs, January 30, 1970, DIAND file 271/31-5-13-3-1, vol. 3 (ICC Documents, p. 447).

Hyslop acted on Vergette's recommendation by sending a letter to McKinnon asking that he "review the whole transaction and implement whatever procedures you determine are required to bring about an early settlement."[182]

On February 24, 1970, C.B. Gorman, the Acting Regional Director of IAB for the Maritimes, responded that there did not seem to be any real impasse and that he had been advised by Wallace LaBillois that the NBWA was still reviewing the proposed agreement. Gorman advised that a meeting between the Band Council and the NBWA was being arranged within the next week or two.[183]

On March 19, 1970, the Eel River Band Council passed a Band Council Resolution accepting the terms proposed by the NBWA. The resolution, which was signed by Chief Alfred Narvie and Mrs Wallace LaBillois, set out the following terms:

> A. $15,000.00 upon the signing of the agreement (Clause 3 Subsection a)
>
> B. $25,000.00 in consideration of and compensation for conveyances to be made under Clauses 1 and 2.
>
> C. An annual sum determined by the volume of water pumped in accordance with the formula established under Clause 4 (One half cent per 1,000 U.S. gallons pumped, payable on a quarterly basis and based on a year beginning April 1st.) The minimum annual payment is to be $10,000.00 except when the annual volume pumped falls below 1,825,000,000 U.S. gallons.
>
> It is understood that irrespective of daily gallonage pumped[,]payments will be made on the basis of the number of U.S. gallons pumped per day to a maximum of 15,000,000 U.S. gallons per day indicating an annual payment to the Band of $27,375.00
>
> The agreement is to be enforced for a period of twenty years after which it may be renegotiated on a five year basis.[184]

Acting Superintendent V.E. Rhymer forwarded the Band Council Resolution to the Regional Office and noted:

> The Council is desirous of obtaining remuneration from the Water Authority agreement as soon as possible. Part of the funds are committed to the proposed park and town site development. In addition, the Band Council will be purchasing the home of

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[182] C.T.W. Haylop, Acting Director, Department of Indian Affairs, to Regional Director of Indian Affairs, Maritime Regional Office, Amherst, NS, January 30, 1970, DIAND file 271/31-5-13-3-1, vol. 3 (ICC Documents, p. 449).

[183] C.B. Gorman, Acting Maritimes Regional Director, Department of Indian Affairs, to C.T.W. Haylop, Acting Director, Department of Indian Affairs, 25 February 1970, DIAND file 271/31-5-13-3-1, vol. 3 (ICC Documents, p. 450).

[184] Eel River Band Council, Eel River, NB, Band Council Resolution, March 19, 1970 (ICC Documents, p. 451).

> Mr. Wallace Labillois [sic] with part of the revenue to be obtained, leaving Mr. Labillois in a position to proceed with his loan under the Revolving Fund Loan Regulations to acquire the Handicraft business at Fredericton.[185]

Despite the Band Council's apparent interest in proceeding quickly, MacAdam wrote a terse letter to Gorman on April 1, 1970, urging him to clarify certain terms of the draft agreement. There was no indication that concerns with respect to the release and access clauses had been adequately addressed by the Band and the NBWA. He added:

> I am very concerned about that section of the agreement numbered Clause 8 [the release clause] as it is presently drafted, and consider you should ensure that the Band Council is completely aware of its provisions before they approve it. In addition, the Band Council should be fully aware of the intent of the clause numbered 11 dealing with access over all the Reserve lands by workmen and employees of the Authority before they sign the agreement. As a matter of fact, I cannot see how the Band Council could reasonably approve the provisions of Clause 8 as it is presently drafted, since they nor anyone else for that matter, cannot forecast what damages may occur in the future, as a result of the construction of the dam.[186]

Interestingly, MacAdam took some pains to explain what he saw as the respective roles and responsibilities of Indian Affairs in Ottawa and the Regional Office vis-à-vis the Band Council:

> Since it is not the function of this office nor is it feasible for us to enter into the negotiating process between applicants for the use and occupation of Indian Reserve lands, and the Band Councils responsible for the Band's interests therein, the responsibility for ensuring that this matter is satisfactorily resolved rests in your office or that of the Agency Superintendent.
>
> As you will be aware from previous correspondence, the draft agreement is to be approved and signed by:
>
> (a) The Water Authority
> (b) The Eel River Band Council, and
> (c) the Minister

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[185] V.E. Rhymer, Acting Superintendent, Indian Affairs Branch, to Maritime Regional Office, March 20, 1970, DIAND file 271/31-5-13-3-1, vol. 3 (ICC Documents, p. 452).

[186] J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, to Acting Regional Director, Maritimes Regional Office, Department of Indian Affairs, April 1, 1970, DIAND file 271/31-5-13-3-1, vol. 1, Rights-of-way, Gaslines and Pipelines, Eel River IR 3, NB Water Authority, General (ICC Documents, pp. 454-55).

> in that order. It is essential that the agreement contain provisions which the Minister may approve before it reaches him. For this reason, it is equally essential that you ensure that the unreasonable provisions of the present clauses 8 and 11 [the release and access clauses] are suitably negotiated and resolved *before* the agreement is signed by the Band Council.[187]

Responding to MacAdam's concerns, Gorman wrote to MacNutt on April 7, 1970, to inform him that after receiving the comments of a legal advisor at Headquarters, the Band and Indian Affairs could not accept the release and access clauses as they stood. Gorman emphasized that while the Band did not want to obstruct the NBWA's ability to maintain the dam, "I think you will agree that this would have to be under some formal type of control."[188] Gorman also wrote to Acting Superintendent Rhymer to ask that he take all necessary steps to ensure that an agreement is reached between the Band Council and the NBWA; in particular, he instructed Rhymer to "contact the Water Authority in Fredericton and ensure that they are aware of the council's wishes. You may wish to take along a representative of the council; however, I will leave this up to you and the council to decide."[189]

On April 17, Rhymer met with NBWA representatives to discuss the release clause. He reported that the difficulty lay in the fact that the NBWA's interpretation of the clause differed from the Department's interpretation:

> According to Mr Lockhart and Mr Fellows this clause covers all lands described in Section 1 [the area to be transferred to the NBWA for the headpond] and 2 [the areas subject to an easement for the pipeline, pumphouse, and access road] only marked in red and orange on the plan forwarded. Mr Lockhart and Mr Fellows both assured me that any future damage caused by the dam beyond the red and orange line have the same meaning and rights whereby the Band or individual would have recourse for any damages, injury and loss to person and property.
>
> It is anticipated a meeting with the Eel River Band Council will be held this week and Section 8 will be fully discussed with them in order to obtain their approval or

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[187] J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, to Acting Regional Director, Maritimes Regional Office, Department of Indian Affairs, April 1, 1970, DIAND file 271/31-5-13-3-1, vol. 1, Rights-of-way, Gaslines and Pipelines, Eel River IR 3, NB Water Authority, General (ICC Documents, pp. 454-55). Emphasis in original.

[188] C.B. Gorman, Acting Regional Director, Maritimes Regional Office, Department of Indian Affairs, Amherst, NS, to P. MacNutt, Solicitor, Department of Justice, Fredericton, NB, April 7, 1970, DIAND file E-5661-3-06013, vol. 1 (ICC Documents, pp. 456-57).

[189] C.B. Gorman, Acting Regional Director, Maritimes Regional Office, Department of Indian Affairs, Amherst, NS, to V.E. Rhymer, Superintendent, Miramichi Agency, April 10, 1970, DIAND file E-5661-3-06013, vol. 1 (ICC Documents, p. 458).

> disapproval of this Agreement. When we have the Council's decision you will be advised.[190]

According to MacNutt, three copies of the agreement were forwarded to Hennigar on May 8 for execution by the Band Council and the Department of Indian Affairs. He also suggested that this agreement "represents the latest series of compromises and adjustments as decided on between the Water Authority and the Band of Indian Affairs [sic] with Mr. Hennigar's consultation."[191]

On May 15, 1970, Rhymer reported that a formal agreement was signed on May 14, 1970, by representatives of the NBWA, the Eel River Band Council, and Her Majesty the Queen in right of Canada as represented by the Department of Indian Affairs and Northern Development. The agreement was signed by E.S. Fellows, Chairman, and J.G. Lockhart, Director, on behalf of the NBWA; Chief Councillor Alfred Narvie and Councillors Mrs Wallace LaBillois and Howard LaBillois on behalf of the Band Council; and C.T.W. Hyslop for the Minister of Indian Affairs and Northern Development. The terms and conditions of the agreement (a copy of which is reproduced in Appendix C of this report) are summarized below:

- Clause 1 provides that Canada is to obtain the necessary approval from the Eel River Band to transfer administration and control of reserve lands flooded as a result of increasing the level of the headpond to the Province of New Brunswick as represented by the Minister of Natural Resources.
- Clause 2 states that Canada will make all necessary arrangements to transfer a grant of easement to the NBWA over reserve lands required for an access road, water pipeline, and pumping station.
- Clauses 3, 4, and 7 provide that in consideration for the transfer of lands required for the headpond, the NBWA shall pay $15,000 to the Band, plus an annual sum based on one-half cent per 1000 U.S. gallons of water pumped from the Eel River and headpond subject to the following provisos: (1) that the minimum payment to the Band shall be $10,000 per year unless the amount pumped is less than 1825 million U.S. gallons for

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[190] V.E. Rhymer, Acting Superintendent, Miramichi Indian Agency, Chatham, NB, to C.B. Gorman, Acting Regional Director, Maritimes Regional Office, Department of Indian Affairs, Amherst, NS, April 20, 1970, DIAND file E-5661-3-06013, vol. 1 (ICC Documents, p. 459).

[191] P.A. MacNutt, Solicitor, Department of Justice, Fredericton, NB, to J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, May 22, 1970, DIAND file 271/31-5-13-3-1, vol. 3 (ICC Documents, p. 471).

that year; (2) any amount pumped in excess of 5475 million U.S. gallons in a year shall not be considered in the calculation of compensation to be paid, resulting in a maximum payment of $27,375 per year.

- Clauses 5 and 6 state that the annual payment for water pumped shall be payable at the agreed rate for a period of 20 years, after which it shall be subject to review and negotiation between the parties every five years. Where the parties are unable to reach agreement, any party can request an arbitrator to resolve the dispute.
- Clause 8 states that the NBWA shall pay $25,000 to the Band in consideration for the transfer of land described above and "to cover the cost of all damage, injury and loss to person and property of the Council which may heretofore or hereafter be sustained in consequence of the erection and operation of the Eel River dam, Eel River water-supply system and the Eel River headpond and subject to section 11 the repair and maintenance of same."
- Clauses 9 and 10 provide that the Band shall have the right to erect and maintain a commercial marina on the headpond and shall have a first option to purchase any lands transferred to the Province if such lands cease to be used for the purposes of a water supply system.
- Clause 11 provides that the NBWA and its employees shall have a right of access to the reserve for the purposes of inspecting, constructing, maintaining, and repairing the Eel River headpond, dam, and water supply system, but shall pay reasonable compensation for any damage done to reserve property or crops.

Rhymer's report to the Maritime Regional Office on May 15, 1970, also confirmed that, in addition to the $15,000 and $25,000 payments provided for in the agreement for the conveyance of land to the NBWA, the amount of $9591.12 was payable to the Band for water pumped from the Eel River from July 4, 1969, to March 31, 1970, and thereafter for each quarter commencing on April 1, 1970.[192]

On May 25, 1970, D. Greyeyes, the new Regional Director of the Maritime Office, forwarded the signed agreement to Ottawa and recommended that it be signed on behalf of the Minister of Indian Affairs and returned to him for distribution. In his memorandum, Greyeyes stated:

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[192] V.E. Rhymer, Acting Superintendent, Miramichi Indian Agency, to Maritime Regional Office, Department of Indian Affairs, May 15, 1970, DIAND file 271/31-5-13-3-1, vol. 3 (ICC Documents, p. 470).

> Clause 8 of the agreement has been discussed at length with officials of the Water Authority and the Band Council to ensure full understanding of the provisions contained therein. The interpretation by the principals of the Water Authority is that this clause covers all lands described in Sections 1 and 2 only which are marked in red and orange on the plan provided. Assurance is consequently given that any future damage caused by construction beyond these boundaries would be subject to damage claims.
>
> Paragraph [11] would be normal to allow proper maintenance to the dam and water supply system. It is expected that any use of reserve lands for these purposes would be at the consent and with the approval of Band Council.
>
> The Band Council are fully aware of all conditions contained in the agreement and by Resolution dated March 19th, 1970 gave their consent to acceptance.[193]

Vergette, the Acting Chief of the Land Division, also recommended to Hyslop, the Acting Director of the Indian-Eskimo Economic Development Branch, that the agreement be executed.[194] Accordingly, the agreement was duly executed by Hyslop on behalf of the Minister.[195]

On July 7, 1970, MacNutt responded to MacAdam's letter of June 8 in which he proposed to transfer the lands to be flooded to the NBWA by letters patent. MacNutt indicated that if the IAB intended to proceed under the authority of section 35(3) of the *Indian Act*, his interpretation of that provision was that "if a provincial authority has powers of expropriation that the Governor in Council may in lieu of authorizing the expropriation authorize the transfer or the making of a grant of such lands to the provincial authority subject to such terms and conditions as may be prescribed by the Governor in Council."[196] Since the *Expropriation Act* conferred powers of expropriation on Ministers of the provincial government, MacNutt suggested that the grant of lands be made to Her Majesty the Queen in right of the Province of New Brunswick as represented by the Minister of Natural Resources.

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[193] D.G. Greyeyes, Regional Director, Maritime Regional Headquarters, Department of Indian Affairs, Amherst, NS, to Indian and Eskimo Affairs Branch, Department of Indian Affairs, May 25, 1970, DIAND file 271/31-5-13-3-1, vol. 3 (ICC Documents, p. 472).

[194] H.T. Vergette, Acting Chief, Lands Division, Economic Development Branch, Department of Indian Affairs, Ottawa, to C.T.W. Hyslop, Acting Director, Indian and Eskimo Economic Development Branch, Department of Indian Affairs, June 2, 1970, DIAND file 271/31-5-13-3-1, vol. 3 (ICC Documents, p. 473).

[195] J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Department of Indian Affairs, Ottawa, to P.A. MacNutt, Solicitor, Department of Justice, Fredericton, NB, June 8, 1970, DIAND file 271/31-5-13-3-1, vol. 3 (ICC Documents, pp. 474-75).

[196] P.A. MacNutt, Solicitor, Department of Justice, Fredericton, NB, to J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, DIAND file 271/31-5-13-3-1, vol. 3 (ICC Documents, pp. 488-89).

On July 22, 1970, the Assistant Deputy Minister of Indian Affairs, J.B. Bergevin, issued a letter-permit under section 28(2) of the *Indian Act* to R.L. Bishop, the Deputy Minister of the Department of Natural Resources, authorizing "the Department of Natural Resources, Province of New Brunswick, its successors and assigns to enter upon and use those parts of Eel River Indian Reserve Number 3, more particularly described hereunder, for as long as required for the purposes outlined: 1. For a pumping station and pipeline right of way; [land description for Lot 60A] . . . 2.43 acres, more or less. 2. For an access road; [land description for Lot 61A] . . . 2.28 acres more or less."[197] The permit was granted subject to the proviso that the NBWA could not assign or sublet its rights without the written authority of the Minister of Indian Affairs. This letter-permit was registered with the Indian Land Registry in August 1970.

By Order in Council PC 1970-1526 dated September 9, 1970, the federal government transferred administration and control of Lots 59, 60, and 61, containing a total of 61.57 acres of land, at Eel River Indian Reserve to the Province of New Brunswick for headpond purposes, pursuant to section 35 of the *Indian Act*. The Order in Council provided that the transfer of administration and control to the province was for "so long as the said lands are being used for head-pond purposes and that, upon the lands ceasing to be so used the administration and control thereof shall revert to Her Majesty in right of Canada for the use and benefit of the Eel River Band of Indians."[198] The Order in Council was registered with the Indian Land Registry on September 25, 1970.

In accordance with the agreement, the NBWA made full payment for moneys owed to the Band in the amount of $49,591.12. The money was received at the Miramichi office of Indian Affairs on July 8, 1970, and deposited to the revenue account of the Eel River Band on the same day.[199]

EFFECT OF THE DAM ON THE EEL RIVER BAR FIRST NATION

As previously noted, in 1963 the parties agreed to retain the services of Dr Medcof to survey the clam flats in Eel River Cove before the construction of the dam and in the years following to determine whether there was any impact on the Band's clam fishery. Prior to conducting these surveys, the value of the clam fishery was unclear, with differing estimates being offered by the Band and by the Fisheries Research Branch.

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[197] J.B. Bergevin, Assistant Deputy Minister, Department of Indian Affairs, to R.L. Bishop, Deputy Minister, Department of Natural Resources, Fredericton, NB, July 22, 1970 (ICC Documents, pp. 490-91).

[198] Governor General in Council, Government of Canada, Privy Council Office, Ottawa, Order in Council, September 9, 1970, DIAND file 271/31-5-13-3-1, vol. 3 (ICC Documents, pp. 503-04).

[199] D.G. Greyeyes, Regional Director, Maritime Regional Headquarters, Department of Indian Affairs, to J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, October 1, 1970, DIAND file 271/31-5-13-3-1, vol. 3 (ICC Documents, p. 510).

The first survey was actually conducted by Dr MacPhail, who noted that clams were abundant in Eel River Cove in July 1963.[200] The second survey of the same area was also conducted by Dr MacPhail during July 1964, after the dam had been constructed. This survey was inconclusive as to the effects on the clam stocks caused by damming the estuary of Eel River, as the various factors affecting the clam population had not been in operation for very long.[201]

The third and final survey was conducted by Dr Medcof in August 1967. In 1968, he reported that, between 1963 and 1967, the average annual landings for the Band had decreased by 56 per cent, from an estimated 2062 pails before damming to 911 after damming (a difference of 1151 pails). Because of the unusual increase in clam landings immediately following the damming of the river, Dr Medcof stressed that it was extremely unlikely that landings would be maintained at this level. It was much more likely that long-term future average annual landings would be maintained at the 1967 Indian landings, which amounted to 620 pails. In his view, the fairest settlement would be compensation for the 70 per cent decrease from pre-dam average annual landings by Indians (2062 pails) to the 1967 Indian landings (620 pails).[202]

In a 1980 memorandum pertaining to environmental damage arising from the construction of the dam and erosion of the shoreline, it was recorded that Gordon LaBillois stated the resulting losses to be $55,000 per year; because fishing had been closed down since 1972, that loss multiplied by eight years equalled $440,000 in losses by 1980. LaBillois had also pointed out that social assistance had been cut off to the First Nation when the compensation of $25,000 was paid.[203]

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[200] J.S. MacPhail, Fisheries Research Board of Canada, Biological Station, St Andrews, NB, "Survey of Eel River Cove, N.B., Soft-Shell Clam (Mya arenaria) Population," January 9, 1964 (ICC Exhibit 2, vol. 1, tab 18).

[201] J.S. MacPhail, Fisheries Research Board of Canada, Biological Station, St Andrews, NB, "Second Survey of Eel River Cove, N.B., Soft-Shell Clam (Mya arenaria) Population," September 1, 1964 (ICC Exhibit 2, vol. 1, tab 19).

[202] J.C. Medcof, Fisheries Research Board of Canada, Biological Station, St Andrews, NB, "Third Survey of Eel River Cove, N.B., Soft-Shell Clam (Mya Arenaria) Population," November 1967 (ICC Exhibit 2, vol. 1, tab 20, p. 41).

[203] [Author not identified], [Eel River – Environment Problem], January 1, 1980, DIAND file E-5661-3-06013, vol. 1 (ICC Documents, pp. 997-98).

It is evident that both the subsistence and the commercial economy of the First Nation suffered from the erection of the dam. When asked how the community felt about the dam being built, Marion LaBillois responded:

> Oh, my God. Really sorry. Sorry they did that. They put the dam there and we were to make our living after that, we don't anymore. Don't even get the animals anymore. They ruined the fishing, ruined everything. No more eels, no more smelts, no more trout. Salmon used to go up there, they don't no more.[204]

Aside from the damages caused to the First Nation's economy, the damming of the Eel River profoundly altered this community's way of life. The strong family and community ties forged by generations of harvesting activities in and around the Eel River have unquestionably played a key role in the sense of identity and the collective health of this community. As many elders stated at the community session, the people of Eel River Bar experienced a quality of life that was unique and rewarding. Community members spoke of pride, continuity with traditions and values, and the fact that clam gathering represented an important social function for the community.[205]

However, the contamination of the fishery and resources of the Eel River dramatically changed both the way of life and the outlook of the First Nation. As explained by Wallace LaBillois:

> To be truthful with you, this drove me to the point, when everything was all said and done – I moved my people – my family out of the community to get away from this creature, if you want to put it that way, that was plaguing my people. Whether it was a demon, or whatever you wanted to call it, it was a curse to our people because we had to take our people and we had to change their whole philosophy and their whole way of life right around.[206]

When asked whether the compensation provided for the losses had been adequate, Wallace LaBillois replied:

> Even the monies that they are getting today, I really and truly don't think it is adequate because money is not the solution. The dignity to be able to go to work and to leave your home and take your lunch can and go to work, this is the important thing. It is not the money. To be able to go and earn your living. To be able to have your kids

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[204] ICC Transcript, April 23, 1996, p. 34 (Marion LaBillois).

[205] ICC Transcript, April 23, 1996, p. 92 (Gordon LaBillois).

[206] ICC Examination of Wallace LaBillois Transcript, July 11, 1996, p. 49.

> put up their shoulders and say, "There goes my dad going to work." It is not the money part, no, no. Heck, no.[207]

By early 1980, additional scrutiny was brought to bear on the environmental problems caused by the dam. In July 1980, Indian Affairs requested a progress report on studies that had been commissioned from Environment Canada pertaining to oceanographic problems associated with the construction of the dam and erosion of the shoreline at Eel River. These studies were probably initiated, at least partly, as a result of a Chiefs' conference in October 1979 where the problem of contamination was raised. The memorandum from Indian Affairs notes that Gordon LaBillois expressed concerns that the clam beds were being contaminated by waste from the surrounding industries.[208]

In November 1982, the Eel River Bar First Nation passed a Band Council Resolution requesting that Indian Affairs provide the Band Council with $30,000 to carry out a land use study, to allow the First Nation to evaluate the environmental impact of the damming of the Eel River.[209] Although the First Nation's request appears to have been declined, in July 1983 Gordon LaBillois requested that Indian Affairs provide the First Nation with all correspondence regarding the damming of the Eel River and with a copy of the earlier study done to determine the value of the resources before the construction of the dam.[210] While still awaiting the requested information, the Eel River Bar First Nation passed a Band Council Resolution in August 1983 resolving that Indian Affairs take action to rectify the problems affecting the community's way of life. The problems enumerated were as follows: (1) pollution of the Eel River and resulting contamination of the clam beds and an annual $60,000 revenue loss; and (2) the flooding of land caused by the International Paper Company pipeline. The First Nation called for a study of the 1970 agreement to determine its validity, and for a study of the negative environmental effects caused by the erection of the dam, particularly in relation to land erosion and loss of fish and wildlife.[211]

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[207] ICC Examination of Wallace LaBillois Transcript, July 11, 1996, p. 66.

[208] [Author not identified] [Eel River – Environment Problem] January 1, 1980, DIAND file E-5661-3-06013, vol. 1 (ICC Documents, pp. 597-98).

[209] E. Hulsman, Regional Planner, Band Support Directorate, Atlantic Region, Department of Indian and Inuit Affairs, Amherst, NS, to District Manager, New Brunswick District, NB, December 20, 1982, DIAND file E-5661-3-06013, vol. 1 (ICC Documents, p. 603).

[210] Gordon LaBillois, Councillor, Eel River Band, to R.D. Campbell, Director, Reserves & Trusts, Atlantic Region, Indian and Inuit Affairs, Amherst, NS, July 21, 1983, DIAND file E-5661-3-06013, vol. 1 (ICC Documents, p. 604).

[211] Eel River Band Council, Band Council Resolution, August 25, 1983, DIAND file E-5661-3-06013, vol. 1 (ICC Documents, p. 607).

Following receipt of this Band Council Resolution, the 1970 agreement was referred to the Department of Justice for an opinion as to its validity. The issues raised by the resolution were substantiated by an Airphoto Interpretation Study of Eel River Bar, which noted that the watermain leaked over its entire length within the reserve's boundaries, causing an extensive wet area. This surface water deprived the reserve of approximately 6 hectares of land that was otherwise capable of development and it eliminated the possibility of an access road to land areas suitable for development in the eastern section of the reserve. It was subsequently recommended that this watermain should be repaired or replaced, the latter being preferably underground.[212]

In May 1984, the First Nation passed another Band Council Resolution requesting that Indian Affairs report on the 1970 agreement and the resulting permit to the province of New Brunswick.[213] Subsequently, the International Paper Company responded to Indian Affairs about the problems with leakage, stating that although it had no present plans to replace the pipe, it would meet with and discuss the matter with all concerned parties.[214] It appears that neither this response nor that received from Indian Affairs was sufficient to address the First Nation's concerns. At this point, the First Nation began the historical and legal research required to substantiate a claim against the Crown in an attempt to resolve this grievance through the Specific Claims process.

RENEGOTIATION OF TERMS IN THE 1970 AGREEMENT (1995)

Despite the First Nation's concerns with the original agreement reached in 1970, on April 10, 1995, the Government of New Brunswick and the First Nation renegotiated section 3 of the 1970 agreement relating to pumping fees. The parties agreed that the First Nation would receive $265,000 as payment for the period since the expiry of the original compensation clause on May 14, 1990. On signing the agreement, the First Nation would receive the sum of $105,000 as compensation for the period between July 31, 1994, to July 31, 1995, with an acknowledgment that Canada Industries Limited had been paid an additional sum of $99,660.77 by the province. Furthermore, it was agreed that the First Nation would receive, in advance, a flat rate of $204,660.77 per year, commencing on July 31, 1995, until July 31, 1998. The agreement reached on non-monetary compensation included a lease to a parcel of Crown land adjacent to Murray Lake, as well as an undeveloped portion of Chaleur Park, at an annual rate of one dollar ($1.00) per year, along with a provision that this lease would be subject to separate negotiations with the Department of Natural Resources and Energy. The First Nation received the "sole" option to purchase the leased lands at a price not to exceed $64,000 for the lands at Chaleur Park and $41,000 for the parcel of Crown land adjacent to Murray Lake.[215]

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[212] E. Hulsman, Regional Planner, Band Support, Atlantic Region, Department of Indian and Inuit Affairs, to R.D. Campbell, Director, Reserves & Trusts, Atlantic Regional Office, February 7, 1984, DIAND file E-5661-3-06013, vol. 1 (ICC Documents, p. 610).

[213] Eel River Bar First Nation, Eel River, NB, Band Council Resolution, May 31, 1984, DIAND file E-5661-3-06013, vol. 1 (ICC Documents, p. 611).

[214] D.J. Tremblay, Plant Engineer, NBIP, to R.W. Landry, Superintendent, Reserves & Trusts, New Brunswick District, February 22, 1985, DIAND file E-5661-3-06013-D2, vol. 1 (ICC Documents, p. 620).

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[215] DIAND Indian Land Registry, Agreement between the Council of the Eel River Band and the Province of New Brunswick, April 10, 1995. Instrument No. 236161 for Eel River, IR 3, NB, registered on October 12, 1995.

PART III

ISSUES

Counsel for the First Nation and for Canada agreed that the Commission should address the following issues in this inquiry:

Was the Eel River Bar First Nation claim in respect of the Eel River dam properly rejected under the Specific Claims Policy set out in ***Outstanding Business***, based upon the evidence and submissions to the Minister of Indian Affairs? Did the claim disclose a breach of a "lawful obligation" by the Crown, and, in particular:

1 What was the nature and extent of the breach of the Treaty of 1779?

2 Did the federal Crown breach the Order in Council dated February 24, 1807, establishing the Eel River Bar reserve?

3 Did the federal Crown breach the 1958 federal-provincial agreement by which New Brunswick transferred to the federal government lands reserved for Indians?

4 Did the Eel River Bar First Nation have riparian rights to the Eel River, and were those rights breached by the federal Crown?

5 Did the federal Crown breach sections 18, 28, 35, or 37 to 41 of the *Indian Act*, RSC 1952, c. 149?

6 Did the Eel River Bar First Nation receive equitable and fair compensation for the losses suffered as a result of the establishment of the Eel River dam?

7 Did the federal Crown have a fiduciary duty to negotiate the compensation agreement of May 1970 on behalf of the Eel River Bar First Nation directly with third parties? If so, did the federal Crown breach that fiduciary duty?

8 Did the federal Crown have a fiduciary duty to provide independent legal advice during the negotiations that led to the execution of the compensa-

tion agreement of May 1970? If so, did the federal Crown breach that fiduciary duty?

In the course of this inquiry, the Commission received and considered a considerable body of historical documentation, the oral testimony of elders from the Eel River Bar First Nation, and comprehensive written and oral submissions on the facts and law presented by legal counsel on behalf of the parties. In short, a wealth of information has been provided to the Commission to assist us in our deliberations.

Part IV of this report sets out our analysis and findings by addressing the issues under three main sections. The first section deals with the nature and extent of the First Nation's fishing rights and whether construction of the dam infringed upon those rights. The second part of our analysis considers whether the Crown breached its statutory obligations under the *Indian Act* by granting a letter-permit and by consenting to the expropriation of Eel River reserve lands in 1970. Finally, we considered the nature and extent of the Crown's fiduciary obligations on the facts of this case.

PART IV

ANALYSIS

ISSUE 1 NATURE AND EXTENT OF FISHING RIGHTS

What was the nature and extent of the breach of the Treaty of 1779?

Did the federal Crown breach the Order in Council dated February 24, 1807, establishing the Eel River Bar reserve?

Did the federal Crown breach the 1958 federal-provincial agreement by which New Brunswick transferred to the federal government lands reserved for Indians?

Did the Eel River Bar First Nation have riparian rights to the Eel River, and were those rights breached by the federal Crown?

The First Nation submits that the Treaty of 1779 and the 1807 Order in Council establishing the Eel River Bar reserve guarantee the First Nation's right to fish in the area around the reserve and that the "Federal Government's participation and acquiescence in the Dam project was a breach of the First Nation members' personal and commercial fishing rights."[216]

The Treaty of 1779 stated that the Micmac Indians of New Brunswick from Cape Tormentine to the Baie des Chaleurs "shall remain Quiet and Free from any molestation of any of His Majesty's Troops or other his good Subjects in their Hunting and Fishing." The New Brunswick Court of Appeal in *R. v. Paul* interpreted this clause to mean that the pre-existing hunting and fishing rights of the Micmacs, which they had exercised from time immemorial, were recognized and confirmed in the Treaty of 1779.[217] Although there was no evidence before the court as to what area constituted the "Districts" referred to in the treaty, Chief Justice Hughes stated:

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[216] Submissions on Behalf of the Eel River Bar First Nation, February 13, 1997, p. 27, para 75.

[217] *R. v. Paul*, [1981] 2 CNLR 83 (NBCA).

> In these circumstances, I would interpret it to mean the Micmac Indian Reserves between Cape Tormentine and Bay De Chaleurs . . . and the Indians having the right to live on those reserves. Consequently, I would hold the right of hunting and fishing for such Indians is restricted to those reserves.[218]

The First Nation further argued that the 1807 Order in Council which established the Eel River Bar reserve also confirms the existence of its traditional fishing rights. The Order in Council states:

> . . . the vacant tract of land on Eel River commencing at Lot No. 6 north of the mouth of the Eel River and extending to Lot no. 1 at the extremity of the Sand Beach which forms the entrance of the River – including the Eel Fishery, be reserved for the use of the Indians – with the exception of the Sand Beach formerly reserved for the public Fishery.

The First Nation submitted that it is necessary to consider the purpose for which the Indian reserve was set aside in order to determine the nature and scope of a First Nation's rights in waters adjacent to a reserve. In *Pasco v. Canadian National Railway Co.*, the British Columbia Supreme Court granted an interim injunction sought by an Indian Band preventing railway construction along a river on the grounds that it could affect the Band's riparian and fishing rights. Although it did not decide the point, the Court stated that the Band's claim to proprietary rights in the river was strengthened because,

> [i]n this province, Indian reserves were reduced in size on the grounds that the Indian people did not rely on agriculture, and that so long as their fisheries were preserved their need for land was minimal.[219]

This view is supported by Richard Bartlett in his study *Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights*. Bartlett concluded that in reserves such as Eel River Bar which are established by Order in Council instead of by treaty or agreement, the "Indian interest in waters appurtenant to reserves set apart by executive action is accordingly to be determined by examination of the circumstances and instruments whereby the lands were set apart."[220]

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[218] *R. v. Paul*, [1981] 2 CNLR 83 at 90 (NBCA).

[219] *Pasco v. Canadian National Railway Co.*, [1986] 1 CNLR 34 (BCCA), affirming [1986] 1 CNLR 35 at 41 (BCSC).

Counsel for the First Nation argued that the Eel River Bar First Nation has a right of access to the adjacent fishery to maintain its livelihood because the reserve set aside for the First Nation was small and its soil was not suitable for agriculture. Based on this reasoning, counsel argued that the First Nation's fishing rights were "non-exclusive rights of non-interference with the personal and commercial fishery."[221]

Canada did not dispute that the Treaty of 1779 protects the First Nation's right to fish in and around the Eel River Bar reserve, but contended that the essential questions were whether there was valid authority to construct the Eel River dam and whether the First Nation received adequate compensation for losses suffered as a result of the dam's construction.[222] Canada submits that if the dam breached the First Nation's rights under the Treaty of 1779, such breach was compensated for in the 1970 agreement.

After considering all the evidence and arguments presented by counsel on this subject, we felt that there was insufficient information before us to make any definitive conclusions regarding the nature and extent of the First Nation's treaty rights. We can, however, offer the following comments on the nature of these treaty rights, subject to the caution that they not be considered conclusive. First, although there was no evidence before the Commission on the historical context and intentions of the parties to the treaty of 1779, it has not been disputed that the First Nation is entitled to exercise fishing rights pursuant to the treaty because the reserve is located between Cape Tormentine and the Baie des Chaleurs. Second, since the reserve was not suitable for agriculture, it is reasonable to conclude that it was set aside to enable the First Nation to maintain a livelihood by harvesting marine resources on and adjacent to the reserve.[223] Third, the 1807 Order in Council reserved "the Eel Fishery" for the exclusive use of the First Nation, but the "Sand Beach" was intended to be used as a public fishery. We note that the careful use of capital letters to refer to specific places suggests that the Order in Council was intended to reserve the "Eel River" fishery, and not the "eel" fishery, to the Micmac Indians. Without further evidence and argument, however, it is difficult to determine whether the public fishery on the "Sand Beach" was intended to refer to the clam flats at the entrance of the Eel River and whether the Order in Council effectively limited the First Nation's treaty fishing rights on the clam flats.

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[220] Richard H. Bartlett, *Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights* (Calgary: University of Calgary, 1988), 37. Bartlett relies on the following three decisions for this conclusion: *Burrard Power Co. v. The King*, [1911] AC 87 (PC); *Attorney General for Quebec v. Attorney General for Canada [subnom. Star Chrome Mining]*, [1921] 1 AC 401 (PC); *Davey v. Isaac*, [1977] 77 DLR (3d) 481(SCC).

[221] Submissions on Behalf of the Eel River Bar First Nation, February 13, 1997, p. 30.

[222] Submissions on Behalf of the Government of Canada, February 14, 1997, p. 31.

[223] It will be recalled that in 1938 the Inspector of Indian Agencies commented that the reserve was not suitable for farming, because of the marshy land, and that a "worse place could not have been chosen for a reserve": Jude Thibault, Inspector of Indian Agencies, to Indian Affairs Branch, Ottawa, September 16, 1938, DIAND file 271/30-13-3, vol. 1 (ICC Documents, p. 58).

We are also of the view that the treaty right to harvest fish and clams "[f]ree from any molestation" on the part of the British Crown and its subjects cannot be interpreted to mean that it was an inviolate right when the dam was constructed in the 1960s. Before the enactment of section 35 of the *Constitution Act, 1982*, which recognized and affirmed the "existing aboriginal and treaty rights" of First Nations in Canada, the Crown could infringe upon or extinguish treaty rights providing that it expressed a "clear and plain intention" to do so.[224] Although counsel for the First Nation is correct in saying that, after 1982, treaty rights could not be extinguished or infringed upon unless the Crown met the strict test of justification set out by the Supreme Court in *Sparrow v. The Queen*,[225] the rights in question here were infringed upon by construction of the dam in the 1960s and would have been subject to the state of the law that existed at the time. Furthermore, as indicated by counsel for the First Nation, it is always open to a First Nation to negotiate a settlement to compensate for a breach or infringement of treaty rights.[226]

In summary, we conclude that the rights conferred by the Treaty of 1779 were infringed upon by the construction of the dam because it interfered with the Micmac Indians' rights to fish free from any interference on the part of the Crown.[227] We acknowledge and agree with the First Nation's submissions on the significance of its hunting and fishing rights, and we accept that the Treaty was intended to protect a livelihood that had sustained the First Nation since time immemorial. Ample evidence was given at the community session by members of the Eel River Bar First Nation on the significance of the clam fishery to the First Nation's culture and livelihood. The question though is whether the Crown had the lawful authority, either by statute or with the agreement of the Eel River Bar First Nation, to construct the dam in 1963. In either case, the First Nation's traditional practices and reliance on the fishery were protected by the Treaty of 1779, and it is our view that the First Nation was entitled to compensation for the infringement upon its treaty rights and for the damages caused to its source of livelihood.

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[224] *R. v. Sparrow*, [1990] 1 SCR.

[225] *R. v. Sparrow*, [1990] 1 SCR.

[226] ICC Transcript, February 20, 1997, p. 45 (Murray Klippenstein).

[227] On this point, we agree with counsel for the First Nation that the facts in *Claxton v. Saanichton Marina Ltd.*, [1989] 3 CNLR 46 (BCCA), are strikingly similar because the treaty in that case guaranteed the First Nation's right to carry on its fisheries "as formerly." The *Claxton* case does, however, differ from the present case in two significant ways. First, the treaty rights in that case were protected by section 35(1) of the *Constitution Act, 1982*, which requires that the Crown meet a strict justificatory standard where there is a *prima facie* infringement on unextinguished treaty rights: *R. v. Sparrow*, [1990] 1 SCR 1075. Second, the First Nation in that case did not enter into any agreements authorizing the infringement on its fishing rights.

Although it is questionable whether Indian Affairs was aware that the First Nation had treaty fishing rights in and around the reserve when construction of the dam was first proposed in 1962, it is clear that all parties involved in the negotiations considered that the First Nation was entitled to compensation for the economic losses it would sustain as a result of the dam. The Treaty of 1779 is not mentioned anywhere in the negotiations leading up to the 1970 agreement, but the IAB was clearly alive to the fact that the main reason that compensation had to be secured for the First Nation was for economic loss for damage to the fishery, particularly the Band's clam harvest. At the outset of the discussions about the potential dam, McKinnon stated that "erection of a dam will mean the flooding of a fairly large flat which at the moment provides approximately 50% of the clam production. It is therefore quite valuable to the Indians."[228] In 1970, the First Nation entered into an agreement, and compensation was paid for damages caused by the dam, described in the recitals of the agreement as follows: "[T]he Authority recognizes that the construction of the dam and the reservoir has diminished the quantities of fish, shellfish, waterfowl, and other natural resources which were traditionally available to the Indians."[229]

Subject to our comments below with respect to whether lawful authority was obtained by the Town of Dalhousie and the Province of New Brunswick to construct the dam on reserve lands and whether adequate compensation was paid to the Eel River Bar First Nation, it is our view that the infringement on the First Nation's treaty rights caused by the dam is not sufficient, in and of itself, to establish an outstanding lawful obligation on the part of the federal Crown.

In view of our findings above, it is not necessary for the Commission to determine whether the First Nation had any riparian rights in addition to its treaty rights to fish in the waters adjacent to the reserve or whether Canada breached the 1958 federal-provincial agreement which transferred administration and control of Indian reserve lands from the Province of New Brunswick to the federal government. In our view, the First Nation's claim will ultimately turn on whether sufficient authority was provided for construction of the dam and whether adequate compensation was paid to the First Nation for damages caused to its beneficial use of the fisheries.

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[228] F.B. McKinnon, Regional Supervisor, Maritime Regional Office, Indian Affairs Branch, to Indian Affairs Branch, February 27, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 126).

[229] *Agreement*, between the Eel River Band Council, New Brunswick Water Authority, and Her Majesty the Queen in right of Canada, May 14, 1970 (ICC Documents, p. 463).

ISSUE 2 AUTHORITY FOR PERMIT AND EXPROPRIATION OF EEL RIVER RESERVE LAND

Did the federal Crown breach sections 18, 28, 35, or 37 to 41 of the *Indian Act*, RSC 1952, c. 149?

For easy reference, the relevant provisions of the *Indian Act*, RSC 1952, c. 149, have been reproduced in Appendix D to this report.

Section 18

Section 18(1) of the *Indian Act* reads as follows:

> **18.**(1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart; and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

The First Nation submitted that section 18(1) of the *Indian Act*, which requires that the federal Crown hold reserve lands for the use and benefit of the band for whom it was set aside, was breached when part of its reserve was disposed of for construction of the Eel River dam "to promote the general interests of the Town and the industry users rather than the First Nation."[230] The First Nation contended that another violation of section 18(1) occurred when the Crown allowed the Town of Dalhousie to trespass on the reserve from 1962, when a preliminary survey on the clam harvest was conducted by Dr Medcof, until at least 1970, when an agreement was entered into by the NBWA which purported to authorize the use and occupation of reserve land. Moreover, the First Nation argued that if the 1970 agreement was void, the province was in continuous trespass until 1990.[231]

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[230] Submissions on Behalf of the Eel River Bar First Nation, February 13, 1997, p. 33.
[231] Submissions on Behalf of the Eel River Bar First Nation, February 13, 1997, p. 33.

The leading case on section 18(1) is *Guerin v. The Queen*, a case involving the surrender of 162 acres of reserve land by the Musqueam Band for lease to the Shaughnessy Golf Club on the understanding that the lease would contain certain terms and conditions agreed to by the Band Council. The surrender document required the Crown to lease the land on such terms as it deemed most conducive to the welfare of the Band. The Band later discovered, however, that the Crown agreed to lease the land on terms that were less favourable than those agreed to by the Band.

All eight members of the Court found that the Crown owed a legal duty to the Band in relation to the surrender and that this duty had been breached. There were, however, three separate reasons for judgment rendered by the Court, each disclosing different characterizations of the nature of the Crown's duty under the circumstances. On behalf of the majority of the Court, Dickson J (as he then was) examined the statutory regime governing the disposition of Indian interests in land and made the following comments on the obligations of the Crown:

> In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.
>
> The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.[232]

Mr Justice Dickson stated that the Crown first took on a responsibility to act on behalf of Indians with respect to the sale or lease of their lands through the *Royal Proclamation of 1763*, which prohibited Indian bands from directly transferring their interests in land to third parties without first surrendering those interests to the Crown.[233] This surrender requirement is still a key part of the *Indian Act* today and, as Justice Dickson stated, it is the responsibility entailed in these provisions which provides the source of a distinct fiduciary obligation on the part of the Crown:

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[232] *Guerin v. The Queen*, [1984] 2 SCR 335, [1984] 6 WWR 481, 13 DLR (4th) 321, 53 NR 161, [1985]1 CNLR 120 at 131.

> Through the confirmation in the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie. This is the effect of s. 18(1) of the *Act*.
>
> This discretion on the part of the Crown, far from ousting, as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one... [W]here by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.[234]

Dickson J noted that "[t]he discretion which is the hallmark of any fiduciary relationship is capable of being considerably narrowed in a particular case," and that section 18(1) itself provides that such discretion can be narrowed by the terms of any treaty, surrender, or other provisions of the *Indian Act*.[235]

Madam Justice Wilson, concurring in the result, stated that section 18(1)

> is the acknowledgment of a historical reality, namely that Indian bands have a beneficial interest in their reserves and that the Crown has a responsibility to protect their interest and make sure that any purpose to which reserve land is put will not interfere with it. . . . The bands do not have the fee in their lands; their interest is a limited

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[233] The *Royal Proclamation of 1763*, RSC 1970, App. II, which entrenched and formalized the process whereby only the Crown could obtain Indian lands through agreement or purchase from the Indians, states:

> And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians; In order, therefore, to prevent such irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie. . . .

[234] *Guerin v. The Queen*, [1984] 2 SCR 335 at 383, [1985] 1 CNLR 120 at 137.

[235] *Guerin v. The Queen*, [1984] 2 SCR 335 at 387, [1985] 1 CNLR 120 at 139.

> one. But it is an interest which cannot be derogated from or interfered with by the Crown's utilization of the land for purposes incompatible with the Indian title unless, of course, the Indians agree.[236]

Although Justice Wilson recognized that the Crown has a fiduciary responsibility with respect to the management of Indian reserve land, she also recognized that an Indian band may effectively "pre-empt" the Crown's authority where it has agreed to surrender its land for a specific purpose.[237]

Therefore, the scope of the Crown's fiduciary duties will always depend on the nature of the relationship between the Crown and the band involved in any given situation. It is also clear that in cases like the present one, where we are dealing with the disposition of interests in reserve lands, the scope of these duties may also depend on the relevant statutory provisions governing the disposition of or the use and occupation of reserve land. Depending on the context, the Crown's discretion may be narrowed where the band has retained some measure of decision-making autonomy vis-à-vis the Crown. Whether the Crown owes a specific fiduciary duty, as well as the extent of that duty, must depend on the nature of the relationship between the Crown and the band. The band's consent to a surrender or to a limited disposition of reserve land may be a relevant factor, depending on the context. This view was affirmed by Mr Justice Iacobucci in *Quebec (Attorney-General) v. Canada (National Energy Board)*, where he states:

> It is now well-settled that there is a fiduciary relationship between the federal Crown and the aboriginal people of Canada: *Guerin v. Canada* . . . None the less, it must be remembered that not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation: *Lac Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14, 26 C.P.R. (3d) 97, [1989] 2 S.C.R. 574. The nature of the relationship between the parties defines the scope, and the limits, of the duties that will be imposed.[238]

Since section 18 is but one manifestation of the Crown's fiduciary duty in the context of Indian lands, we will come back to this point later in this report. It is nevertheless important to bear in mind the principles enunciated by the court in *Guerin*, as well as the underlying policy of the *Indian Act*, while interpreting the various provisions of the *Indian Act* dealing with surrender, expropriation, and the use and occupation of reserve land. Whether the Crown had the legal authority under the provisions of section 28(2) and section 35 of the *Indian Act* to flood the headpond and to maintain the Eel River water supply system on reserve lands will be dealt with in the following sections. Those sections of the Act will be addressed in turn.

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[236] *Guerin v. The Queen*, [1984] 2 SCR 335 at 349, [1985] 1 CNLR 120 at 152.

[237] *Guerin v. The Queen*, [1984] 2 SCR 335 at 352, [1985] 1 CNLR 120 at 154.

[238] *Quebec (Attorney-General) v. Canada (National Energy Board)*, [1994] 1 SCR 159 at 183, 112 DLR (4th) 129 at 147.

Section 28(2) and the 1970 Letter-Permit

Section 28 of the *Indian Act* states:

> **28.**(1) Subject to subsection (2), any deed, lease, contract, instrument, document or agreement of any kind, whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.
>
> (2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

When construction of the dam commenced in 1963, the Band and Indian Affairs allowed work to proceed despite the absence of any formal agreement or arrangement pursuant to the *Indian Act* authorizing the town to use and occupy reserve land for the purposes of flooding. No permit was issued in 1963 under section 28(2) of the *Indian Act* authorizing the use and occupation of reserve lands, nor had there been any surrender or expropriation of reserve land for this purpose. In 1968 and in 1970, the Minister of Indian Affairs issued permits under the authority of section 28(2) to allow the NBWA to use and occupy reserve land for the purpose of establishing and maintaining an access road, a pumping station, and a second pipeline to transport water from the dam into the Town of Dalhousie. The first permit, in September 1968, was issued for a period of one year, pending final settlement between the town and the Band. The 1970 letter-permit authorized the Department of Natural Resources to "enter upon and use" 2.43 acres for a pumping station and pipeline right of way, and 2.28 acres for an access road "for as long as required for the purposes outlined." In this section, we intend to address only whether the 1970 letter-permit provided the NBWA with lawful authority to use and occupy reserve land. Later in this report, we will consider whether the town and the NBWA trespassed on Eel River reserve lands from 1963 until 1970, when permits were issued under section 28(2) for rights of way with respect to the access road, the pipeline, and the pumphouse, and when lands were expropriated for the headpond under section 35.

Counsel for the First Nation submitted that the 1970 letter-permit should not have been issued by Canada because permits under section 28(2) should only be granted for a limited term. Furthermore, because the permit effectively granted an interest in land, the proper procedure would have been to obtain a surrender by the Band in accordance with the procedures set out in sections 37 to 41 of the *Indian Act*. In support of its contention that the permit granted an interest in land which was akin to a lease, the First Nation referred to guidelines with respect to the issuance of permits set out in the *Land Management and Procedures Manual* prepared by the Department of Indian Affairs in 1988. Counsel submitted:

> According to Government Guidelines, s. 28(2) does not allow for the granting of leases in the guise of permits. Permits are meant to provide personal, rather than proprietary rights. They tend not to be exclusive to one party and are usually granted for short periods of time. The permit, which was offered to the Province pursuant to the 1970 agreement, was invalid as it created a right which ran with land since the Dam is now a permanent fixture.[239]

The manual referred to above suggests that it would be appropriate to use a permit to grant the non-exclusive use of a road or right of way, or to allow utilities such as telephone and hydro lines to service an Indian reserve exclusively.[240] While section 28(2) had been used in the past to provide rights of way for utilities crossing through reserves to service non-reserve lands, the manual states that permits should not be granted for "permanent installations such as roads, pipelines, electric and telephone cables and surface support structures" attached to reserve lands unless "the sole purpose of the utility is to service reserve lands and the exclusive use of those lands is not required by the subject utility."[241] Before drawing any definite conclusions, however, it is important that the Commission first examine the relevant case law to determine whether these guidelines reflect the judicial interpretation of section 28(2) and the circumstances in which a permit can be issued by the Department of Indian Affairs.

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[239] Submissions on Behalf of the Eel River Bar First Nation, February 13, 1997, p. 34.
[240] DIAND, *Land Management Procedures Manual* (1988), ICC Exhibit 2, vol. 1, tab 26, p. 3.
[241] DIAND, *Land Management Procedures Manual* (1988), ICC Exhibit 2, vol. 1, tab 26, p. 4.

Counsel for Canada relied on *Opetchesaht Indian Band v. Canada*,[242] a decision of the British Columbia Court of Appeal, in support of its argument that the 1970 agreement was valid because "the 1956 amendment of ss. 28(2) created a general and unlimited power to grant rights of occupation and use of reserve lands to third parties without a surrender."[243] Providing that the grant of rights in a reserve is limited to what would be regarded in common law as a "licence" rather than an "interest in land," a permit under section 28(2) must be considered valid. Since the 1970 letter-permit did not involve a transfer of title or a grant of ownership to the province of New Brunswick, Canada contends that it was not required to obtain rights in the reserve pursuant to the expropriation or surrender provisions of the *Indian Act*. Finally, Canada stated that the Court of Appeal found that section 28(2) authorized the "grant of rights either for a period having a predetermined termination date or until the happening of a future event the date of which cannot be known at the commencement of the term."[244] Therefore, Canada submitted that the permits granted to the Province of New Brunswick were valid, based on the state of the law as it existed when the parties made their submissions. The First Nation submitted that *Opetchesaht* had been wrongly decided by the Court of Appeal and that it was distinguishable from the facts in this case.

Following the parties' submissions on these issues, the Supreme Court of Canada rendered its decision in the appeal of *Opetchesaht*[245] and upheld the ruling of the Court of Appeal. Since this decision represents the current state of the law, we shall carefully consider the reasoning of the Court to determine whether it applies equally to the circumstances before us in relation to the Eel River Bar First Nation.

The facts in *Opetchesaht* are as follows. In 1959 the Minister of Indian Affairs granted, with the consent of the Opetchesaht Band Council, a right of way for an electric power transmission line across the Band's reserve to convey electricity to consumers off the reserve. Between February and July 1958, there were negotiations between the Band, the Crown, and the British Columbia Hydro and Power Authority (Hydro) to acquire the right of way. Negotiations were protracted, with several proposals being made by each side, including yearly rental payments for 20 years, free electricity for the Band, various offers on the value of the land, and expropriation under section 35 of the *Indian Act*. An agreement was concluded between the Crown and Hydro, with the consent of the Band Council, for a right of way 150 feet wide over 7.87 acres of the reserve (approximately 2.5 per cent of the reserve land base). Total consideration paid to the Band was a single payment of $125 per acre for the land covered by the right of way. There was no evidence that the Band was paid less than fair market value.

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[242] *Opetchesaht Indian Band v. Canada* (1997), unreported, SCR, file no. 24161.
[243] Submissions on Behalf of the Government of Canada, February 14, 1997, p. 40.
[244] Submissions on Behalf of the Government of Canada, February 14, 1997, p. 41.
[245] *Opetchesaht Indian Band v. Canada* (1997), unreported, SCR, file no. 24161.

A permit was issued under the authority of section 28(2), which provided, in part, that Hydro had the right to construct, operate, and maintain the power line. It also had the exclusive right to occupy the portions of the surface of the reserve where poles were erected, and that part of the air space where the wires ran. The Band retained the right to use and occupy the balance of the right of way area, subject to certain restrictions related to the operation and maintenance of the structures. The permit specified that the rights granted to Hydro could be exercised "for such a period of time as the said right of way is required for the purpose of an electric power transmission line."[246] Hydro could not assign its rights without the consent of the Crown.

In the late 1980s, the Band decided to build a private road, reservoir access road, and drainage ditch within the right of way. When agreement could not be reached between Hydro and the Band over the proposed development, the Band applied to the Supreme Court of British Columbia in 1992 for a declaration that the permit was void and unenforceable, for an order for possession of the lands, and for damages for trespass. The Band's claim was based on the assertion that section 28(2) did not authorize the grant of a right of way for an indefinite period of time. The trial judge allowed the application and declared that the permit was not authorized by section 28(2). However, the BC Court of Appeal set aside the declaration, concluding that although the period was indefinite, it was nonetheless determinable.

The Supreme Court of Canada dismissed the appeal, but split 7–2 on the question of whether the permit was properly issued under section 28(2). Major J, writing for the majority, concluded that a permit may be issued under section 28(2) for an indefinite period of time with the consent of the Band Council, providing that the period is capable of ascertainment and does not constitute a grant in perpetuity. For the minority, McLachlin J reasoned that the grant of an easement or right of way for an indefinite period of time falls outside the intended scope of section 28(2) because it has the potential to continue in perpetuity. Such an interest in the reserve land can be alienated only by surrender with the consent of the entire band membership, pursuant to section 37 or by the formal process of expropriation under section 35 of the *Indian Act*.

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[246] *Opetchesaht Indian Band v. Canada* (1997), unreported, SCR, file no. 24161.

On behalf of the majority, Justice Major stated that three issues are raised in determining whether section 28(2) authorized the permit granted:

> First, it is necessary to identify the nature and scope of the rights granted by the permit; second, whether the termination of the permit is defined by the happening of a reasonably ascertainable event; and finally, whether the permit constitutes a "sale, alienation, lease or other disposition" under s. 37 of the *Indian Act* rather than a grant of rights under s. 28(2).[247]

Following this analytical framework, Major J concluded that the nature of the right of way granted by the permit was statutory in origin and analogous to an easement over the reserve that was subject to termination when it was no longer required for a power transmission line. Further, Hydro's rights were not exclusive, since Band members retained the right to use the right of way and their "ability to use the land is restricted only in that they cannot erect buildings on it or interfere with the respondent Hydro's easement. Both Hydro and the Band share use of the right of way."[248]

On the question of whether the permit was for an ascertainable period, Major J concluded that the statutory easement was granted for an indeterminate period, since it was not known exactly when the right of way would terminate. Nevertheless, because the easement would terminate when it was no longer required for a transmission line, this constituted "a period whose end is readily ascertainable."[249] Furthermore, Major J disagreed that Hydro controlled the duration of the permit such that the permit could be characterized as perpetual. Whether the transmission was "required" by Hydro was a justiciable issue that could be objectively determined by the courts.

With respect to whether the words "any longer period" in section 28(2) were intended to limit permits to a fixed number of years, Major J held that a period can be measured either by dates or events:

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[247] *Opetchesaht Indian Band v. Canada* (1997), unreported, SCR, file no. 24161, p. 4, Major J.
[248] *Opetchesaht Indian Band v. Canada* (1997), unreported, SCR, file no. 24161, p. 10, Major J.
[249] *Opetchesaht Indian Band v. Canada* (1997), unreported, SCR, file no. 24161, p. 11, Major J.

> The end point of a permit need not be defined in terms of a specific calendar date as long as it is ascertainable. The only requirement is that the end of the period be capable of ascertainment so that it does not constitute a grant in perpetuity.[250]

Major J, however, cautioned that, depending on the facts in each case, there may be instances where there is a grant for a perpetual duration, although it has been disguised to look like a defined period. For instance, he suggested that the grant of a right of way for "as long as the sun shall shine and the rivers flow" would be suspicious because the "terminable event is so remote and uncertain that the period is, in fact perpetual."[251] In other words, one must look at the facts of each case to determine whether the event is reasonably ascertainable.

The Opetchesaht Band argued that, because of its potentially lengthy duration, the right of way should have been effected by way of surrender to the Crown pursuant to section 37 of the *Indian Act*. To answer this argument, Major J examined the nature of Indian title in reserve land and the interplay between the surrender provisions of the *Indian Act* in sections 37 to 41 on one hand and section 28(2) permits on the other. Section 37 states:

> 37. Except where this Act otherwise provides, lands in a reserve shall not be sold, alienated, leased or otherwise disposed of until they have been surrendered to Her Majesty by the band for whose use and benefit in common the reserve was set apart.

Section 38 goes on to provide that surrenders may be absolute or qualified and they may be conditional or unconditional. In *Smith v. The Queen*, the Supreme Court of Canada held that where a band provides an absolute and unconditional surrender of reserve land, the Indian interest in the land disappears.[252] It is also true, however, that a surrender can be qualified so that it only partially or temporarily releases the interest of the band. Accordingly, Major J stated that "surrenders are required as a general rule not only when the Indian band is releasing all its interest in the reserve forever, but whenever any interest is given up for any duration of time."[253] Furthermore, section 37 is not limited to the sale or complete alienation of reserve land, and a surrender is required for leases and other dispositions of reserve lands.

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[250] *Opetchesaht Indian Band v. Canada* (1997), unreported, SCR, file no. 24161, p. 14, Major J.

[251] *Opetchesaht Indian Band v. Canada* (1997), unreported, SCR, file no. 24161, p. 14, Major J.

[252] *Smith v. The Queen*, [1983] 1 SCR 554.

[253] *Opetchesaht Indian Band v. Canada* (1997), unreported, SCR, file no. 24161, p. 16, Major J. In support of this point, Major J cited *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, [1950] SCR 211 at 219, Rand J.

Major J also noted that the same analysis applies equally to section 35, which specifies that the expropriation power may be exercised "in relation to lands in a reserve or any interest therein."

While the general rule requires that sales, leases, and other dispositions of Indian interests in reserve land should be effected by way of a surrender, Major J states that section 37 must be read in conjunction with other provisions of the Act:

> Also apparent on the face of s. 37 from the qualification at the beginning of s. 37 is the legislative intention that it operate *in conjunction with and subject to* other provisions of the *Indian Act*. There is in this qualification an express recognition that other provisions of the *Indian Act* also deal with sales, alienations, leases or other dispositions of lands in a reserve.
>
> . . .
>
> The practice of the Minister demonstrates that in his view, some sections of the *Indian Act* could be used interchangeably depending on the circumstances. . . . the practice which occurred in Canada after the 1956 amendments to the *Indian Act* was to grant power line rights of way across reserve lands both by way of surrender and conveyance (s. 37), expropriation (s. 35) and by permit (s. 28(2)).
>
> . . .
>
> *The question is whether the permit was properly granted under s. 28(2). Perhaps the easement in the permit could have been granted under s. 37, but that section must be read subject to other provisions in the Indian Act. The proper question is to decide the circumstances in which s. 28(2) could not apply, the default provision being the general rule in s. 37 against alienation without a surrender.*
>
> *In my view, s. 28(2) cannot apply any time a portion of the Indian interest in any portion of reserve land is permanently disposed of*. . . .
>
> In the instant case, the respondent Hydro was accorded limited rights of occupation and use *for an indeterminate but determinable and ascertainable period of time. There was no permanent disposition of any Indian interest. Furthermore, the Band and Hydro were obligated to share the rights of use and occupation of the land, with the limited exceptions of the area of ground giving support to the poles and the air space occupied by the poles*. Consequently, the surrender requirement of s. 37 does not apply to the present permit and more importantly, no rights exceeding those authorized by s. 28(2) were granted. The indeterminate easement granted on the face of this permit is a disposition of a limited interest in land that does not last forever.
>
> Surely it was intended that the band council could at least have the right to grant that type of easement. Surrender involves a serious abdication of the Indian interest in

> land and gives rise to both a broad discretion and an equally onerous fiduciary obligation on the Crown to deal with the Indian lands thus surrendered.[254]

The Court also commented on whether the grant of rights for an indeterminate period ran contrary to the underlying policy of the *Indian Act*:

> The remaining question is whether the grant of rights for an indeterminate period conflicts with the policy of prohibiting use of reserve land by third parties absent approval of the Minister and the band. This leads to a consideration of the policy behind the rule of general inalienability. Both the common law and the *Indian Act* guard against the erosion of the native land base through conveyances by individual band members or by any group of members. Government approval, either by way of the Governor in Council (surrender) or that of the Minister, is required to guard against exploitation: *Blueberry River Indian Band, supra*, at p. 370, *per* McLachlin J.
>
> On the other hand, the *Indian Act* also seeks to allow bands a degree of autonomy in managing band resources for commercial advantage in the general interest of the band. Collective consent of the Indians, either in the form of a vote by the band membership (surrender) or by a resolution of the band council, is required to ensure that those affected by the transfer assent to it. *The extent to which individual band members participate in the approval process depends on the extent to which the proposed disposition affects individual or communal interests.* In the case of sales, dispositions and long-term leases or alienations permanently disposing of any Indian interest in reserve land, surrender is required, involving the vote of all members of the band. On the other hand in the case of rights of use, occupation or residence for a period of longer than one year, only band council approval is required.
>
> It is important that the band's interest be protected but on the other hand the autonomy of the band in decision making affecting its land and resources must be promoted and respected. These sometimes conflicting values were identified by McLachlin J. in *Blueberry River Indian Band, supra*, at p. 370:
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>> My view is that the *Indian Act*'s provisions for surrender of band reserves strikes [sic] a balance between the two extremes of autonomy and protection.
>
> Gonthier J. at p. 358, speaking for the majority, accepted this principle:
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>> As McLachlin J. observes, the law treats aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured.
>
> With the twin policies of autonomy and protection in mind, s. 37 and s. 28(2) reflect that, depending on the nature of the rights granted, different levels of autonomy and protection are accorded. Section 37 demonstrates a high degree of protec-

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[254] *Opetchesaht Indian Band v. Canada* (1997), unreported, SCR, file no. 24161, pp. 17-20, Major J. Emphasis added.

> tion, in that the approval of the Governor in Council and the vote of all of the members of the band are required. ***This indicates that s. 37 applies where significant rights, usually permanent and/or total rights in reserve lands are being transferred.*** On the other hand, under s. 28(2), lesser dispositions are contemplated and the interest transferred must be temporary. It is evident from a review of this permit that it does not violate the balance between autonomy and protection struck by the *Indian Act*. This is not a case where surrender, with all of its administrative and legal impositions was required in terms of the overall policy of the *Indian Act*.[255]

Based on this reasoning, Major J concluded that the permit was authorized by section 28(2) of the *Indian Act*. He also noted that the Band Council had provided its consent to the permit after protracted negotiations between the parties. Since the proceedings before the Court were based on a motion for summary judgment, no claim of unfairness or uneven bargain had been made, and the Court declined to make any findings on other factual and legal issues, such as undue influence and breach of fiduciary duty, which would require evidence and argument in a trial.[256]

For the minority, McLachlin J also looked at the interplay among the surrender provisions, the expropriation power, and section 28(2) permits in light of the general rule of inalienability that is inherent in the underlying policy of the *Indian Act*. McLachlin J acknowledged that the term in the permit was not perpetual in the sense of being entirely within Hydro's control, but she also felt that the length of the term and the nature of the alienated interest were sufficiently important to take the permit beyond the scope of section 28(2):

> [I]t must be acknowledged that the easement has the *potential* to continue forever (or at least until the world ends and its continuance becomes academic). In terms relevant to the concerns of the Opetchesaht people, it shows every promise of binding not only the current generation which never agreed to it, but many generations to come. The permit may without exaggeration be characterized as an alienation of reserve lands for an indefinite period, a period which has the potential to extend to future generations of the Opetchesaht people for as far forward as we can see. Is this, we must ask, the type of disposition Parliament intended to allow under the summary procedures of s. 28(2) of the *Indian Act* upon agreement between the Minister and the current band council? Or is it the sort of alienation of interest in land which

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[255] *Opetchesaht Indian Band v. Canada* (1997), unreported, SCR, file no. 24161, pp. 21-22 (per Major J). Emphasis added.

[256] *Opetchesaht Indian Band v. Canada* (1997), unreported, SCR, file no. 24161, p. 23, Major J.

> Parliament sought to safeguard by the surrender and transfer provisions of s. 37 of the Act?[257]

Since McLachlin considered the phrase "or any longer period" in subsection 28(2) of the *Indian Act* to be ambiguous, she relied on the principles governing the interpretation of statutes relating to Indians as set out in *Nowegijick v. The Queen*[258] and *Mitchell v. Peguis Indian Band*,[259] which provide that statutory provisions aimed at maintaining Indian rights should be broadly interpreted, whereas provisions aimed at limiting or abrogating such rights should be narrowly construed. Having regard for the balance between the two extremes of autonomy and protection that run through various provisions of the *Indian Act*, McLachlin J concluded:

> Section 28 was never intended to deal with major long-term alienations of Indian interests in their reserve lands. It was aimed rather at the short-term, non-exclusive occupant – the itinerant worker, service provider or agricultural lessee. The phrase "any longer period", consistent with this interpretation, is best understood as a period defined in relatively short terms of months and years. This makes sense in textual terms as well. The phrase "any longer period" relates to the earlier phrase "a period not exceeding one year". This suggests that what Parliament intended by "any longer period" was also a term capable of being expressed in finite calendar terms.
>
> The question arises: how long is the short or temporary use contemplated by s. 28(2)? For the purposes of this case, it is unnecessary to decide this issue; certainly an alienation which has the potential to go on as long as anyone can foresee falls outside the scope of s. 28(2). However, for purposes of guidance in other cases, I would suggest that commitments longer than the two-year mandate of band councils should not be transacted through s. 28(2).
>
> This interpretation is consistent with the policy of the *Royal Proclamation of 1763*, and the principle that the long-term alienation of interests in Indian lands may be effected only through surrender to the Crown and consent of the band membership as a whole. To accept the views of the respondents in this case is to accept that parties seeking to obtain long-term or indefinite interests in reserve lands short of outright ownership could use the s. 28 permit provisions to circumvent the surrender requirements of the *Indian Act* and proceed to dispose of long-term interests in land with only the consent of the band council. It would be to attribute to Parliament the intention to establish two alternative and inconsistent ways for alienation of major interests in reserve lands – one strictly limited and regulated under s. 37, the other requiring only the approval of the Minister and the band council. Finally, it would attribute to Parliament the intention to accord the entire band membership the right

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[257] *Opetchesaht Indian Band v. Canada* (1997), unreported, SCR, file no. 24161, pp. 6-7, McLachlin J. Emphasis added.

[258] *Nowegijick v. The Queen*, [1983] 1 SCR 29.

[259] *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85.

> to decide on alienation under s. 37, while depriving the membership of that power for transfers that may represent equally serious alienations under s. 28(2), and this despite the fact that s. 37 establishes consent of the band members as a condition of alienation not only of outright transfers of land, but of "leases" or other "dispositions". I cannot accept that these were Parliament's intentions.[260]

In view of the majority and minority decisions in ***Opetchesaht***, it is clear that there are two factors which must be taken into account in determining whether a section 28(2) permit can authorize a particular use and occupation of reserve land. The first relates to the length of the term in the permit and whether its duration is reasonably ascertainable. The second relates to the nature and extent of the interest granted. Whether a section 28(2) permit can be used to authorize the use and occupation of reserve land or whether the general rule should apply – namely, that a surrender under section 37 is required to grant the interest in question – will depend on the facts of each case.

In summary, the Court in ***Opetchesaht*** took particular note of the fact that the section 28(2) permit did not grant exclusive rights to Hydro. The permit was granted for the purposes of a power transmission line, which meant that, with the exception of the land and air space occupied by the poles and transmission lines, the Band shared the use of the land covered by the right of way. In concluding that the permit fell within the scope of section 28(2), the Court considered whether the permit was intended to be permanent as well as the extent of the rights being granted, since "s. 37 applies where significant rights, usually permanent and/or total rights in reserve lands are being transferred."[261] In so concluding, the Court held, in our view, that the appropriateness of a section 28(2) permit – as opposed to a section 37 surrender (or a section 35 expropriation) – is a question of degree rather than an absolute test. The degree is to be measured, in our view, by reference to two sliding scales: one ***temporal***, relating to the length of the term and the ascertainability of its termination, and the other ***substantive***, relating to the content of the interest granted.

Applying the principles of the ***Opetchesaht*** decision to the facts before us in the case of the Eel River Bar First Nation, we consider the following factors to be relevant in determining whether the use and occupation of reserve land for the pipeline, access road, and pumping house were properly authorized by the 1970 letter-permit issued under section 28(2) of the ***Indian Act***:

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[260] ***Opetchesaht Indian Band v. Canada*** (1997), unreported, SCR, file no. 24161, pp. 15-17, McLachlin J.
[261] ***Opetchesaht Indian Band v. Canada*** (1997), unreported, SCR, file no. 24161, p. 22, Major J.

1 The interests granted in the 1970 letter-permit are statutory in origin and are analogous to an easement over the Band's reserve lands which terminates when the land is no longer required for the purposes of a pumping station, pipeline right of way, and an access road.

2 The NBWA's rights to the access road are not exclusive, since both the Band and the NBWA have the right to use the access road.

3 Although the nature of the NBWA's rights to use 2.43 acres of the reserve land for the purposes of a pumping station and a pipeline right of way are essentially exclusive, since the pipeline runs above the ground and precludes the Band from sharing the use of this portion of the reserve, the extent of the interest granted is not substantial. The amount of land granted in the permit is approximately 0.66 per cent of the total reserve base left after the expropriation and easements are granted.[262]

4 The right of way is granted for an indeterminate period. Although it could not be known exactly when the NBWA's rights would terminate, the permit is for a period whose end is readily ascertainable and does not amount to a grant in perpetuity. Whether the land is required by the NBWA for the purposes outlined in the permit is a justiciable issue that does not lie within the sole discretion of the NBWA.

5 The grant of an easement to the NBWA was specifically intended *not* to be a "permanent and/or total" disposition of land. The original intention of the parties, as evidenced by the 1963 Band Council Resolution and by subsequent correspondence, was to provide for a taking of the land by the Province, pursuant to section 35 of the Act. Ultimately, the land required for headpond purposes was expropriated. The option of the section 28(2) permit was championed by McKinnon as a way to protect the Band from the NBWA later claiming that the agreement was invalid and that compensation was not payable to the First Nation because it did not have rights to the riverbed or to the fishery. As a result of the representations made by Indian Affairs, a lesser interest was to be granted to the NBWA to use and occupy the land for specific purposes and for a determinable period of time. The grant of a limited permit was intended to give the Band and Indian Affairs some leverage to ensure that the NBWA fulfilled its part of

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[262] The air photo interpretation study, in which the leakage problems were detailed, indicated that approximately 6 hectares (or approximately 15 acres) were unusable as a result of the leakage. At that time, this area would have amounted to approximately 1 per cent of the total reserve area.

the agreement with respect to the annual payments for water pumped out of the headpond.

6 With respect to the "substantive" branch of the Supreme Court's analysis in *Opetchesaht*, there is no evidence before us in this case that the pumping station and the pipeline right of way substantially interfere with the First Nation's use of its reserve land. Although there is evidence in the record relating to problems of leakage from the pipeline and the effect of this leakage on the First Nation and on the reserve land,[263] these issues relate to the NBWA's obligation to maintain the pipeline, rather than to Canada's role in the granting of the permit. Indeed, if the land required for the pumping station and the pipeline had been granted to the NBWA pursuant to a surrender or an expropriation, problems with leakage would still have arisen.

We find that considering these factors in light of the temporal and substantive branches of the *Opetchesaht* analysis leads us to a conclusion that the permit was properly granted under section 28(2) of the Act. The permit was for an indefinite but clearly ascertainable and justiciable period of time. The interest in the land granted did not amount to a permanent disposition of an interest in land such that it required the consent of the Band membership as a whole pursuant to a surrender under section 37.

We also must have regard to the Supreme Court's view in *Opetchesaht* of the policy underlying the Act as a whole, and whether the permit in the present case struck a proper "balance between autonomy and protection." We deal with this issue in more detail below in considering Canada's fiduciary duties in relation to the construction of the dam and the negotiations leading up to the 1970 agreement. Based on the reasoning above, however, we find that the section 28(2) permit granting rights to use and occupy reserve land for the purpose of an access road, a pipeline, and a pumping station was given under valid authority.

Section 35 Expropriation of the Headpond

The First Nation submits that the expropriation of 61.57 acres of reserve land for the headpond in 1970 was invalid, based on the following arguments. First, neither the federal nor the provincial Crown could exercise the expropriation powers under section 35 of the *Indian Act* or provincial legislation because those powers are exercisable only in the event that agreement cannot be reached with the owner. In this case, the Band consented to the use of the land for the purposes of the dam, so the powers were not exercisable. Second, Canada failed to represent the Band's interests by allowing the expropriation, since the "dominant intent was not to benefit the best interests of the members of the First Nation but the actual purpose was to enhance certain corporate interests."[264] Third, the expropriation procedures set out in the New Brunswick *Expropriation Act*[265] were not complied with. Therefore, the First Nation submits that the Crown was required to obtain a surrender for the disposition of these lands.

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[263] E. Hulsman, Regional Planner, Band Support, Atlantic Region, Department of Indian and Inuit Affairs, to R.D. Campbell, Director, Reserves & Trusts, Atlantic Regional Office, February 7, 1984, DIAND file E-5661-3-06013, vol. 1 (ICC Documents, p. 610).

In response, Canada submits that the statutory provisions of the provincial *Expropriation Act* and the *Indian Act* were complied with, because the Governor in Council consented to the taking of the reserve lands for public purposes. The fact that the Band consented to the use of expropriation powers does not alter the non-consensual nature of the taking of the reserve lands, so a surrender was not required. Moreover, the 1970 agreement was valid and does not invalidate the expropriation.

Before considering the merits of the parties' submissions, it is necessary to refer to the wording of section 35, which states:

> **35.**(1) Where by an Act of the Parliament of Canada or a provincial legislature Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in a reserve or any interest therein.
>
> (2) Unless the Governor in Council otherwise directs, all matters relating to compulsory taking or using of lands in a reserve under subsection (1) shall be governed by the statute by which the powers are conferred.
>
> (3) Whenever the Governor in Council has consented to the exercise by a province, authority or corporation of the powers referred to in subsection (1), the Governor in Council may, in lieu of the province, authority or corporation taking or using the lands without consent of the owner, authorize a transfer or grant of such lands to the province, authority or corporation, subject to any terms that may be prescribed by the Governor in Council.

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[264] Submission and Clarification of the Evidence and Supporting Legal Arguments in respect of the Eel River Bar First Nation Land Claim, February 14, 1995 (ICC Exhibit 8, p. 26).

[265] *Expropriation Act*, RSNB 1952, c. 77, as amended.

> (4) Any amount that is agreed upon or awarded in respect of the compulsory taking or using of land under this section or that is paid for a transfer or grant of land pursuant to this section shall be paid to the Receiver General of Canada for the use and benefit of the Band or for the use and benefit of any Indian who is entitled to compensation or payment as a result of the exercise of the powers referred to in subsection (1).

Section 35 provides two methods by which the Province of New Brunswick could have obtained the Indian interest in reserve lands for the establishment of a headpond. Section 35(1) states that where a province is "*empowered* to take or to use lands . . . without the consent of the owner," the Governor in Council may consent to the exercise of the province's expropriation powers for the compulsory taking of reserve land. Where the Governor in Council consents to the actual exercise of such expropriation powers under subsection (1), section 35(2) stipulates that all matters respecting the compulsory taking of land shall be governed by the constating legislation of the expropriating authority, unless the Governor in Council otherwise directs. The second method is set out in section 35(3), which provides that the Governor in Council may "in lieu of the province . . . taking or using the lands without consent of the owner, authorize a transfer or grant of such lands to the province . . . subject to any terms that may be prescribed by the Governor in Council." Section 35(3), therefore, provides the Governor in Council with the discretion to transfer reserve lands to the expropriating authority without triggering the procedural requirements of the constating legislation that would otherwise govern the compulsory taking of reserve land.

There is a significant difference between the two methods of expropriating reserve lands. If the Governor in Council provided its consent for the taking under section 35(1), the province would have been required to exercise its expropriation powers in accordance with the procedures set out in the provincial *Expropriation Act*. If, however, authority was provided under section 35(3), the procedures of the provincial legislation would not necessarily apply because the Governor in Council has a broad discretion to prescribe the terms for the transfer of reserve land in lieu of an actual taking of land by the province. Whether the expropriation power is exercised under the authority of subsection (1) or (3), it is necessary in both instances to demonstrate that the expropriating authority is "empowered" to take lands without the consent of the owner.

Sections 35(1) and (3), therefore, contemplate that Indian reserve land could be expropriated either with or without the band's consent providing that the Governor in Council provides its consent as required by the Act. In situations where the expropriating authority cannot reach agreement with the band on the compensation to be paid for land required for a public work, the Governor in Council may consent to the taking under section 35(1), subject to the requirement that the expropriation procedures of the statute which confers such powers be followed to the letter. In the present case, if the Governor in Council had consented to the taking of land on the Eel River reserve for the headpond under section 35(1), the province would have been required to comply strictly with the expropriation procedures of the New Brunswick *Expropriation Act*.[266] The method of expropriation set out in section 3 of the *Expropriation Act* requires that the following conditions be met before the Crown enters into possession, use, or enjoyment of the expropriated land: (1) that the Lieutenant Governor in Council pass an Order in Council describing the land to be expropriated; (2) that the Order in Council and plan of the land be filed in the Registry Office; (3) that notice of the Order in Council and a description of the land be published in a local newspaper; and (4) that the owner be compensated for the expropriated land. Sections 5-11 provide that where the expropriating authority and the owner fail to agree on the amount of compensation to be paid, the matter may be referred to the Land Compensation Board for a determination of the fair value of the land, damages, and costs to be paid to the owner. Therefore, where the owner and the expropriating authority are unable to reach agreement on compensation, the procedures set out in sections 5 to 11 provide a measure of protection to land owners to ensure that they obtain fair compensation for expropriated land.

If, however, the expropriating authority is able to reach agreement with a band on the compensation to be paid for expropriated land, section 35(3) of the *Indian Act* gives the Governor in Council the discretion to consent to the transfer of the reserve land, ***in lieu of the land being taken without the band's consent***, subject to any terms that may be prescribed by the Governor in Council. Therefore, if the band consents to the expropriation of reserve land subject to the payment of compensation agreed to between the band and the expropriating authority, there is no need to trigger the procedural requirements of the provincial legislation, since the land can be transferred pursuant to section 35(3).

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[266] *Expropriation Act*, RSNB 1952, c. 77, as amended.

Although the wording of the 1970 Order in Council did not specify which provision was used to authorize the transfer, it is our view that there was a valid taking of reserve lands for the headpond under section 35(3) of the *Indian Act*. The wording of the Order in Council and the surrounding circumstances support a finding that the Governor in Council authorized the transfer of administration of the reserve land to the Province of New Brunswick under section 35(3), in lieu of the province having to take the lands without the consent of the Band pursuant to the procedures of the *Expropriation Act*.

This finding is based on three main considerations. First, on July 7, 1970, shortly after the execution of the 1970 agreement, the solicitor for the NBWA, P.A. MacNutt, wrote to J.H. MacAdam, the administrator of lands for the IAB, to finalize the documentation required to transfer administration and control of the lands to the province. In his letter, MacNutt discussed the authority under which the lands would be transferred:

> I presume you are proposing to proceed under the authority of subsection (3) of section 35 of the *Indian Act*, chapter 149, R.S.C. 1952. It is my interpretation of subsection (3) of section 35 that if a provincial authority has powers of expropriation that the Governor in Council may in lieu of authorizing the expropriation authorize the transfer or the making of a grant of such lands to the provincial authority subject to such terms and conditions as may be prescribed by the Governor in Council. I might point out in this context that the New Brunswick Water Authority does not have powers of expropriation under the *Expropriation Act* of the Province of New Brunswick nor does it have such powers under the Act under which it was incorporated. However, the Minister of Natural Resources of the Province of New Brunswick has powers of expropriation. I enclose herewith a copy of the *Expropriation Act* of the Province of New Brunswick. You will note that the definition of "Minister" is sufficiently broad to include the Minister of Natural Resources to expropriate such lands under the *Expropriation Act* and convey same to the New Brunswick Water Authority. I might add that all land acquired from private landowners in the headpond area has been in the name of Her Majesty the Queen in right of the Province of New Brunswick as represented by the Minister of Natural Resources. Once this land is fully assembled it will then be conveyed to the New Brunswick Water Authority for administration. You will note that the agreement entered into between the New Brunswick Water Authority and the Council of the Eel River Band and Her Majesty the Queen in right of Canada provides in section 1 that upon payment by the Authority Canada will arrange for the transfer of the administration and control of the lands in question to her Majesty the

> Queen in right of the Province of New Brunswick as represented by the Minister of Natural Resources.[267]

On July 23, 1970, MacAdam responded to MacNutt's letter as follows:

> Since you advise that control and management of the lands to be inundated shown as Lots 59, 60, and 61 on C.L.S.R. Plan 55628 is to be transferred to the Minister of Natural Resources, concurrently with this letter I have made a submission to the Governor in Council for authority under section 35 of the *Indian Act* to effect the transfer.[268]

Accordingly, it would appear that MacAdam agreed with MacNutt's suggestion that section 35(3) provided sufficient authority for the Governor in Council to transfer the lands for the headpond to the provincial Minister of Natural Resources. Furthermore, the wording of the Order in Council confirms that the Governor in Council consented to the transfer of reserve land, subject to the payment of compensation, in lieu of the province being required to exercise its expropriation powers under the *Expropriation Act*. Given that the Band had agreed to compensation for the land and its damages, it was not necessary for the Governor in Council to authorize a compulsory taking under section 35(1) and the procedures of the *Expropriation Act*, which would otherwise govern a taking of land without consent of the owner.

Second, it is clear that the province was "empowered" to expropriate the land in question. Section 2 of the *Expropriation Act* provides that the "Lieutenant Governor in Council may at any time purchase or expropriate any land that may be deemed necessary or desirable for carrying out any public work or enterprise, or other public purpose, or for carrying out any work or enterprise deemed to be in the public interest." The definition of a "work," "public work," or "enterprise" set out in section 1(e) of the *Expropriation Act* is broadly worded and includes such works as "dams," "hydraulic works," and "hydraulic privileges." Construction of the dam and the creation of a headpond to supply water to the Town of Dalhousie satisfy the definition of a "public work."

Third, we are also satisfied that the construction of the dam and the headpond was considered to be in the public interest. Counsel for the First

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[267] P.A. MacNutt, Solicitor, Department of Justice, Fredericton, NB, to J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Ottawa, July 7, 1970, DIAND file 271/31-5-13-3-1, vol. 3 (ICC Documents, pp. 488-89).

[268] J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Department of Indian Affairs, Ottawa, to P.A. MacNutt, Solicitor, Department of Justice, Fredericton, NB, July 23, 1970, DIAND file 271/31-5-13-3-1, vol. 3 (ICC Documents, pp. 493-94).

Nation submitted that "the dominant intent was not to benefit the best interests of the members of the First Nation but the actual purpose was to enhance certain corporate interests. It was reported that in the interest of the Town and the industry users, Section 35 expropriation powers would be used because it would be too difficult to use the surrender provisions."[269] In *Kruger*, a similar argument was raised by the claimant and rejected by the court, which concluded that its authority to review the exercise of a statutory power to expropriate is limited to situations where there is "evidence that the 'predominant purpose' of the expropriation was in furtherance of a 'tortious conspiracy to injure the owner of the land.'"[270] In our view, the exercise of the discretion to consent to the expropriation of land in this case is beyond question, because the dominant purpose of the work was to promote economic activity and job creation in the general public interest. On this point, we concur with Canada's written submissions:

> The lands were taken for public purposes. The evidence discloses that the impetus for the construction of the dam was that the Town of Dalhousie wanted to secure a good water supply as to attract an industry to their community. . . Canadian Industries Limited was proposing to commence operations in Dalhousie, and would have needed an adequate water supply in order to do so. This water supply was assured by the Provincial Government . . . Also it was anticipated that the New Brunswick International Paper Plant would be increasing its capacity in the next few years and that this would also require an additional volume of water . . . While the immediate attention for constructing the dam appears to have been only for the benefit of two plants, it can be appreciated that the increasing operations of two plants would have significant employment opportunities for the Town as a whole as well as the north shore of New Brunswick.[271]

We find that the dominant purpose of the dam was to benefit the community generally by increasing the fresh water supply and by potentially enhancing industrial concentration in the area. Although other sources for the water supply were considered by the town, the site chosen was the most suitable location for the establishment of the dam. In short, there is no evidence that the predominant purpose of the dam was "in furtherance of a tortious conspiracy to injure the owner of the land," and the Band itself was interested in the job prospects that would come to the area as a result of the dam's construction. Therefore, it is our view that the expropriation of reserve land for the dam and headpond was for a valid public purpose.

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[269] Eel River Bar First Nation, Submission and Clarification of the Evidence and Supporting Legal Arguments in Respect of the Eel River Bar First Nation Land Claim, February 15, 1995 (ICC Exhibit 8, p. 26).

[270] *Kruger v. The Queen*, [1985] 3 CNLR 15 at 37. The decision of *Warne v. Province of Nova Scotia et al.* (1969), 1 NSR (2d) 150 at 152-53, was cited in support of the test to be met for the courts to review the exercise of the discretion to expropriate land.

[271] Submissions on Behalf of the Government of Canada, February 14, 1997, p. 34.

Since this was an expropriation under section 35(3), it was not necessary for the federal or the provincial Crown to comply with the procedures for a compulsory taking, as set out in the *Expropriation Act*, because that Act not apply in this case. Even if it did apply, we are not convinced that there was any failure to comply with its provisions. Under the *Expropriation Act*, a power existed for the province to apply to a court of competent jurisdiction for an order authorizing the taking of possession of property. However, this specific provincial power is not required to be exercised unless a person resists, opposes, or disputes the taking. Not every statutory stricture under the *Expropriation Act* must be fulfilled where the owner of land that is subject to expropriation has agreed and consented to the expropriation and to the quantum offered for the expropriated land. Often it is up to the owner who is contesting the expropriation, or more typically the compensation, to use procedures under the *Expropriation Act* or other expropriation statutes to challenge the compulsory taking or the quantum of compensation offered by the expropriating authority. The *Expropriation Act* is typical in that it allows compulsory takings by the provincial Crown, subject to the statutory right to compensation. It also provides a process by which compensation may be determined by a Land Compensation Board.[272] Implicit in this ability to have compensation determined by a provincial tribunal, however, is the power for the parties involved to consent to and agree on compensation for the expropriation. The Eel River Bar First Nation clearly consented to and settled for compensation to the compulsory taking.

This brings us to the First Nation's second main argument: that neither the provincial nor the federal Crown could exercise its expropriation powers because such powers can be exercised only where agreement cannot be reached with the band. In this case, the Band Council Resolution of April 9, 1963, requested that the Governor in Council allow the Town of Dalhousie to expropriate reserve land under section 35 of the Act. On April 16, 1963, a general band meeting was held to discuss the proposed construction of the dam. Although it was not a formal surrender meeting, 24 out of the 25 eligible voters who attended were in support of the proposal to construct the dam, subject to the agreed terms set out in the Band Council Resolution. The

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[272] *Expropriation Act*, RSNB 1952, c. 77, as amended, ss. 4B, 5, 6, 7, 11, 12, and 13.

Band Council requested that the land be expropriated because there was an urgency to proceed with the project. If a surrender vote was required, the Band and the IAB were of the view that at least two surrender meetings would be necessary, since only 38 eligible voters lived on the reserve out of a total of 87 eligible voters.

When the IAB sought legal advice on the proposed expropriation, however, it was advised by the departmental Legal Advisor that the expropriation powers of the town under the *Towns Act*[273] "are exercisable by the Town only in the event that an agreement is not or cannot be reached with the land owner. The Council Resolution, provided the terms thereof are acceptable to the Town, is tantamount to an agreement and therefore the expropriation powers are not exercisable."[274] The Legal Advisor, therefore, recommended that an interim permit be granted to the town under section 28 (2) of the *Indian Act*, pending a formal surrender by the Band. Accordingly, the First Nation submits that Canada failed to follow its own legal advice by proceeding to expropriate in the face of the Band's consent.

None of this advice, however, applied to the power of the Province of New Brunswick to expropriate pursuant to the *Expropriation Act*, which is the applicable legislation in this case. Even if the First Nation is correct in its assertion that the powers of expropriation under the *Towns Act* were not exercisable in cases where the owner had consented to the taking, we are not aware of any similar restrictions in the provisions of the *Expropriation Act* or section 35 of the *Indian Act*. Section 35 refers only to whether an entity is ***empowered*** to take or use land without the owner's consent, not whether there is actual consent in a particular case. Furthermore, for the reasons stated above, it is our view that section 35(3) of the *Indian Act* conferred on the Governor in Council a broad discretion to consent to the transfer of reserve land to the province, ***in lieu of the land being taken without the band's consent***, subject to the terms contained in the 1970 agreement between the NBWA, the Band Council, and IAB. Because the Band consented to the expropriation of reserve land, subject to the payment of compensation agreed to between the Band and the NBWA, the transfer of land was authorized by the Governor in Council under section 35(3) rather than section

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[273] *Towns Act*, SNB 1961-62, c. 70, section 132, states: "A council may proceed to acquire by expropriation proceedings lands, buildings and other structures, including any interest therein, whenever a public necessity exists therefor and whenever the council cannot agree with the owner or owners of such property on terms of purchase or settlement . . ."

[274] Jules D'Astous, Chief, Economic Development Division, Indian Affairs Branch, Ottawa, to Regional Supervisor, Maritimes, Indian Affairs Branch, August 19, 1963, DIAND file E-5661-3-06013-D2, vol. 1 (ICC Documents, p. 220).

35(1), and there was no need to trigger the procedural requirements of the *Expropriation Act*.

Furthermore, even though the Band Council consented to the use of expropriation powers under section 35 of the *Indian Act* and agreed to a negotiated settlement on compensation for the land taken, the transfer was still, essentially, a compulsory taking of land. The concept of expropriation is described as follows in the *The Law of Expropriation and Compensation in Canada*:

> In general terms "expropriation" is the compulsory (i.e. against the wishes of the owner), acquisition of property, usually real property, by the Crown or by one of its authorized agencies. The power of expropriation is generally recognized as a necessary adjunct of modern government, but its exercise nearly always results in a traumatic experience for the affected property owner.[275]

The fact that land owners often enter into negotiated settlements with the expropriating authority does not necessarily make the expropriation any less of a compulsory taking of land without the owner's consent, as the Law Reform Commission of British Columbia stated in its 1971 *Report on Expropriation*:

> Where expropriating powers exist, negotiated settlements generally cannot be regarded as voluntary on the part of the vendors. True, in some cases, they may be glad to sell and, in others, although they may have been reluctant to sell initially, the vendors may be happy with the price they bargained for. *But the fact of the matter is that, unless the owners agree to sell, the expropriation powers will be exercised. No doubt most expropriating authorities will at some stage warn the owner that, if agreement cannot be reached, expropriation proceedings will be commenced.*[276]

In this case, the town officials were informed in 1963 that "there was no certainty that the Governor-in-Council would grant permission [under section 35 of the *Indian Act*] in the face of complete opposition from the Band Council."[277] Although it was the policy of the IAB to seek the Band's consent to an expropriation before seeking the Governor in Council's consent to take reserve land, the Governor in Council nevertheless had a broad discretion to consent to the exercise of the Province's expropriation powers in this case if the public interest was important enough to justify a compulsory taking. There can be no doubt that the Band and the IAB must have considered the expropriation of reserve land to be a distinct possibility, given the importance of promoting industry and creating jobs in the Dalhousie area in the 1960s. The reality of the situation, therefore, is that negotiations on compensation proceeded between the Band, the town, and the NBWA in the shadow of a possible expropriation of the land without the Band's consent.

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[275] Eric C.E. Todd, *The Law of Expropriation and Compensation in Canada*, 2d ed. (Scarborough, Ont.: Carswell, 1992), 1.

[276] Law Reform Commission of British Columbia, *Report on Expropriation* (Victoria: Queens Printer, 1971), 37. Emphasis added.

[277] F.B. McKinnon, Supervisor, Maritime Regional Office, to Indian Affairs Branch, January 21, 1963, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, pp. 172-73). Emphasis added.

Under section 35(3) of the *Indian Act*, the Governor in Council had the discretion to consent to the province "taking or using" the land in question, in lieu of the province exercising its powers under an act "of the provincial legislature" to take or to use lands without the consent of the owner. Clearly, there was negotiation, agreement, and consent of the Band as to the quantum of compensation to be paid by the NBWA. This agreement, together with the consent of the Governor in Council, obviated the need to engage in many of the formal expropriation procedures provided under the *Expropriation Act*. To argue that section 35(3) required the province to engage in the formal, mechanical, and procedural requirements of the provincial *Expropriation Act* is to ignore the power of the Governor in Council under section 35(3) to authorize a transfer of reserve land to the province in lieu of a compulsory taking. This argument would also result in the practical effect of there being no distinction between section 35(1) and (3). That is, there would be no difference between the two provisions and subsection (2), which stipulates that the legislation of the expropriating authority shall apply to compulsory takings under section 35(1), would be rendered meaningless and redundant because the logical extension of this argument would require both section 35(1) and (3) expropriations to adhere to provincial expropriation procedures. In our view, this could not have been the intent of Parliament.

In conclusion, if the Governor in Council provided its consent for the taking under section 35(1), the province would have been required to exercise its expropriation powers in accordance with the procedures set out in the provincial *Expropriation Act*. However, where authority was provided under section 35(3) and there was consent to the terms of the expropriation, many of the procedures of the provincial legislation would not apply, because the Governor in Council had the authority to prescribe the terms for the transfer of reserve land in lieu of an actual taking of land by the province under provincial legislation.

Also implicit in the First Nation's submissions is the argument that the Crown ought to have sought a surrender, rather than authorizing an expropriation of reserve land for the headpond. In *Opetchesaht*, Major J confirmed that, although the general rule requires that sales, leases, and other dispositions of Indian interests in reserve land should be effected by way of a surrender, section 37 must be read in conjunction with and subject to other provisions of the Act, including section 35 which provides for the compulsory taking of reserve land without the band's consent. In the case of a section 28(2) permit, the Court stated that the question to be asked is whether the permit was properly granted under that section. If section 28(2) did not apply, then the default provision requiring a surrender under section 37 would be triggered. Similarly, it is our view that the question is whether there was a proper disposition of reserve land under section 37 such that it did not trigger the general rule requiring a surrender. A similar argument was raised by the claimant and rejected by the Federal Court of Appeal in the *Kruger* case, which was considered in the Commission's report on the Sumas Inquiry into the expropriation of a railway right of way. As the Commission stated in that report:

> We cannot agree, however, that the Crown breached its fiduciary duty in failing to obtain a surrender before the land was alienated to third parties. As discussed above, a surrender and a taking are different processes. Furthermore, the surrender provisions in the *Indian Act* [of 1906], section 48, provides that "except as in this part otherwise provided" no reserve shall be alienated, etc., without a surrender. What is included "in this part" is the expropriation provision, section 46. In *Kruger*, the Court undertook this same analysis and all three judges concluded that compliance with the surrender provisions of the *Indian Act* is not required when reserve lands are expropriated under the equivalent to section 46.[278]

For the reasons stated above, we conclude that there was a valid exercise of the expropriation power under section 35. Therefore, it was not necessary for Canada to seek a surrender of the land required for the headpond from the Eel River Band. Having said that, we do intend to address whether the Crown owed any fiduciary obligations with respect to the exercise of its discretion under section 35 under Issue 3 below. We will also address the implications of the First Nation's argument that the Band was not represented by independent legal counsel throughout these negotiations. Before turning to this matter, however, we wish to deal with the question of the authority to use the land from 1963 to 1970.

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[278] Indian Claims Commission, *Sumas Inquiry: Report on Indian Reserve No. 6 Railway Right of Way Claim* (Ottawa, February 1995), 47-48, repr. (1996) 4 ICCP 40-41.

Trespass and Delay from 1963 to 1970

In 1963, the Town of Dalhousie built the dam on the Eel River reserve and flooded additional lands without any specific authority to do so until 1970, when the headpond was expropriated and a letter-permit was granted to the NBWA for the pumping station, the pipeline right of way, and the access road to maintain the Eel River water supply system. No compensation was paid for the use and occupation of reserve land until 1970, when the agreement was entered into with the Band. The First Nation submits that Canada permitted a trespass on the land by allowing construction of the dam to proceed without proper authority, and therefore violated section 18(1) of the Act.

Canada submits that there was no trespass within the meaning of the *Indian Act* because the Band and the Band Council consented to the town entering on the reserve in 1963 to build the dam. Canada contends that the April 9, 1963, Band Council Resolution granted permission to the town to enter on the reserve and build the dam, and that it recommended that the Governor in Council expropriate the land required under section 35 of the *Indian Act*. Since the Band Council Resolution provided for the payment of compensation before the end of 1963 for lands to be flooded, and later in September 1967 after losses to the clam harvest had been determined, the town proceeded on the basis of this authority while negotiations continued. Canada contends that while the parties could not have anticipated that it would take seven years to finalize an agreement on compensation and the use of the land, members of the Band "would have been estopped from pressing a trespass suit because they had agreed to allow the Town to enter on the reserve and carry out the work necessary for the completion of the dam and the dyke, as evidenced by the vote at the general meeting and the BCR of April 9, 1963."[279] Even if the Band was not estopped from raising a claim of trespass, Canada submits that the Band suffered no damages, since the 1970 agreement paid compensation to the Band for all damages and losses suffered as a result of the dam's construction and any alleged trespass.

After considering the arguments of counsel, we conclude that there was a trespass on the reserve from 1963 until 1970. Whether the Band suffered any damages for which it was not compensated is a separate question that will be considered later in this report.

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[279] Submissions on Behalf of the Government of Canada, February 14, 1997, p. 43.

In our view, the sections of the *Indian Act* governing the use and occupation of reserve land or its disposition to non-Indians must be interpreted in such a way as to balance a band's autonomy against the Crown's supervisory and protective role. The Supreme Court of Canada in the *Apsassin*[280] and *Opetchesaht* decisions held that the purpose of the requirement of the Crown's approval in the case of a surrender under section 37 or a section 28(2) permit is to ensure that, in addition to the approval of the band, the proposed transaction or use must also be approved by the Minister or the Governor in Council, as the case may be, to prevent the band from being exploited. The protective responsibility of the Minister of Indian Affairs with respect to the use and occupation of reserve land is made abundantly clear in the wording of section 28 of the *Indian Act*, which states:

> **28.**(1) *Subject to subsection (2), any deed, lease, contract, instrument, document or agreement of any kind,* whether written or oral, *by which a band* or a member of a band *purports to permit a person other than a member of that band to occupy or use a reserve* or to reside or otherwise exercise any rights on a reserve *is void.*
>
> (2) *The Minister may by permit in writing authorize* any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve. [Emphasis added.]

If use and occupation of reserve lands through means other than those specified in the *Indian Act*, including uses allowed solely by the Band, were sanctioned, the Crown would be released from its protective responsibility, contrary to the intent of the *Indian Act* and the policy that underlies it. Accordingly, unless the use and occupation has been authorized by the Crown in one of the forms contemplated by the Act – surrender, expropriation, or permit – the use and occupation of reserve land is contrary to the Act.

Based on the facts before us, it is clear that the 1963 Band Council Resolution could not provide sufficient authorization to the town to enter on and use reserve land for flooding purposes. Section 28(1) states in no uncertain terms that the Band's agreement is void unless the Minister authorizes the use of the reserve land by issuing a permit in writing. Therefore, the consent or agreement of the Band, as expressed in the 1963 Band Council Resolution, is void because no permit was issued by the Minister under section 28(2) as required. This state of affairs remained the same until September 1968, when then Minister of Indian Affairs Jean Chrétien issued a one-year permit allowing the NBWA access to the land to "carry out certain works in connection with a dam, water lines and allied works."[281] At this point, the NBWA had the proper authority to use and occupy the land for these purposes. The reserve lands flooded by the headpond, however, continued to be in a state of trespass until they were expropriated in 1970.

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[280] The *Apsassin* decision is cited as *Blueberry River Indian Band and Doig River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25.

We find, therefore, that there was a trespass on reserve land from 1963 to 1970, the extent of which was narrowed by the 1968 permit. As we set out below, however, we are unable to conclude that any outstanding legal obligation necessarily flows from this trespass because the 1970 agreement was intended to compensate the Eel River Band for its losses and damages arising from the construction of the dam. Whether the Crown fulfilled its fiduciary duties to the Eel River Band during the negotiations leading up to the 1970 agreement, and whether the Band received fair and equitable compensation for its losses, are considered in the next section of this report.

ISSUE 3 FIDUCIARY OBLIGATIONS OF THE CROWN

Did the Eel River Bar First Nation receive equitable and fair compensation for the losses suffered as a result of the establishment of the Eel River dam?

Did the federal Crown have a fiduciary duty to negotiate the compensation agreement of May 1970 on behalf of the Eel River Bar First Nation directly with third parties? If so, did the federal Crown breach that fiduciary duty?

Did the federal Crown have a fiduciary duty to provide independent legal advice during the negotiations that led to the execution of the compensation agreement of May 1970? If so, did the federal Crown breach that fiduciary duty?

In its written submission, the First Nation argued that Canada violated its fiduciary obligations by failing to provide independent legal advice when the various agreements were negotiated with the Band Council, by "failing to negotiate on behalf of the First Nation, or by failing to aid the First Nation in those negotiations."[282] These submissions were amplified in the First Nation's oral argument by the assertion that Canada failed to act prudently when it approved the 1970 agreement by order in council. In support of this assertion, the First Nation relied in particular on the following assertions:

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[281] Eel River Band Council – Miramichi Agency, Eel River, New Brunswick, August 20, 1968, Band Council Resolution (ICC Documents, pp. 356-62).

- Canada did not conduct itself *prudently*, because some decisions were made with respect to the dam project in the absence of IAB officials, and Canada did not put a stop to the project on that basis;[283]
- in 1966, the Band asked for a lawyer, and none was ever provided to it;[284]
- when Wallace LaBillois appeared to have settled the matter on his own with the NBWA representatives, Canada did not stop to consider whether this was an appropriate way to settle the matter;[285] and
- the Governor in Council should not have approved the deal: it was "foolish, improvident and exploitative," since the amounts provided to the Band in the 1970 agreement were insufficient.

Canada, in response, relied on the *Kruger* decision as authority for the proposition that Indian Affairs did have a fiduciary obligation which arose when the NBWA first proposed to take Eel River reserve lands to construct the dam in 1962. Based on the reasoning of Mr Justice Urie in *Kruger*, Canada submitted that the "precise obligation in this case was to ensure that the Indians were properly compensated for the loss of their lands as part of the obligation to deal with the land for the benefit of the Indians . . ." and that the Crown had a duty to exercise its discretion "honestly, prudently and for the benefit of the Band" in negotiating the Band's position in the dam project. Since Indian Affairs took steps to ensure that the Band had the necessary technical and legal advice to make a reasoned decision and that the compensation ultimately paid to the Band was fair, the Crown discharged its fiduciary obligations.[286]

In our view, any determination of the nature and scope of the Crown's fiduciary duties in relation to the protection of reserve lands requires a careful examination of the statutory provisions that apply to the proposed transaction, the nature of the relationship between the Band and the Crown, and the extent to which the Band exercises its own autonomy over decisions affecting its interests. In analysing Canada's fiduciary obligation in the context of the present case, we make reference to our previous reports on the Kahkewistehaw and Moosomin surrenders. In those reports, we analysed the leading Supreme Court of Canada decisions in *Guerin* and *Apsassin* because they offer guidance in identifying and describing the Crown's fiduciary obligations in the context of transactions involving Indian reserve land. We will not repeat at length our analysis of those cases. The following excerpt from the Moosomin report, however, provides a short summary of the Court's findings in *Apsassin* on the the nature and scope of Canada's fiduciary obligations in relation to a surrender of reserve land:

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[282] Submissions on Behalf of the Eel River Bar First Nation, February 13, 1997, p. 37.
[283] ICC Transcript, February 20, 1997, p. 61 (Murray Klippenstein).
[284] ICC Transcript, February 20, 1997, pp. 67-68 (Murray Klippenstein).
[285] ICC Transcript, February 20, 1997, p. 69 (Murray Klippenstein).
[286] Submissions on Behalf of the Government of Canada, February 14, 1997, p. 56.

> The Court's comments on the question of pre-surrender fiduciary obligation may be divided into those touching on the *context* of the surrender and those concerning the substantive *result* of the surrender. The former concern whether the context and process involved in obtaining the surrender allowed the Band to consent properly to the surrender under s. 49(1) and whether its understanding of the dealings was adequate. In the following analysis, we will first address whether the Crown's dealings with the Band were "tainted" and, if so, whether the Band's understanding and consent were affected. We will then consider whether the Band effectively ceded or abnegated its autonomy and decision-making power to or in favour of the Crown.
>
> The substantive aspects of the Supreme Court's comments relate to whether, given the facts and results of the surrender itself, the Governor in Council ought to have withheld its consent to the surrender under section 49(4) because the surrender transaction was foolish, improvident or otherwise exploitative.[287]

With respect to the first branch of this analysis, the Moosomin report states that:

> At the heart of Justice Gonthier's reasons is the notion that "the law treats Aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured."[288] In so holding, he emphasized the fact that the Band had considerable autonomy in deciding whether or not to surrender its land, and that, in making its decision, it had been provided with all the information it needed concerning the nature and consequences of the surrender. Accordingly, in Justice Gonthier's view, a band's decision to

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[287] Indian Claims Commission, *Moosomin First Nation Report on 1909 Reserve Land Surrender Inquiry* (Ottawa, March 1997), p. 110. Emphasis in original.

[288] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25, 130 DLR (4th) 193 at 200.

> surrender its land should be allowed to stand unless the band's understanding of the terms was inadequate or because there were tainted dealings involving the Crown which make it unsafe to rely upon the band's decision as an expression of its true understanding and intention.[289]

Also in relation to the first branch of this analysis, the Commission's report in Kahkewistahaw took note of McLachlin J's finding in *Apsassin* that "a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second 'peculiarly vulnerable' person . . . [t]he person who has ceded power *trusts* the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation."[290] For the purposes of this inquiry, we adopt the analysis set out in the Kahkewistahaw report:

> On the facts in *Apsassin*, McLachlin J found that "the evidence supports the view that *the Band trusted the Crown to provide it with information as to its options and their foreseeable consequences, in relation to the surrender* of the Fort St. John reserve and the acquisition of new reserves which would better suit its life of trapping and hunting. *It does not support the contention that the band abnegated or entrusted its power of decision over the surrender of the reserve to the Crown*." Because the Band had not abnegated or entrusted its decision-making power over the surrender to the Crown, McLachlin J held that "the evidence [did] not support the existence of a fiduciary duty on the Crown prior to the surrender of the reserve by the Band."
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> Justice McLachlin's analysis on what constitutes a cession or abnegation of decision-making power is very brief, no doubt because the facts before her demonstrated that the Beaver Indian Band had made a fully informed decision to surrender its reserve lands and that, at the time, the decision appeared eminently reasonable. In our view, it is not clear from her reasons whether she merely reached an evidentiary conclusion when she found that the Band had not ceded or abnegated its decision-making power to or in favour of the Crown, or whether she intended to state that, as a principle of law, a fiduciary obligation arises only when a band actually takes no part in the decision-making process at all.[291]

After considering further jurisprudence from the Supreme Court of Canada on the question of what is required to cede or abnegate decision-making power to or in favour of a fiduciary, we continued:

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289 Indian Claims Commission, *Moosomin First Nation Report on 1909 Reserve Land Surrender Inquiry* (Ottawa, March 1997), p. 111.

290 *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25, 130 DLR (4th) 193 at 209.

291 Indian Claims Commission, *Kahkewistahaw First Nation Report on 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), p. 112. Footnotes deleted. Emphasis in original.

> Both *Norberg*[292] and *Hodgkinson*[293] suggest that decision-making authority may be ceded or abnegated even where, in a strictly technical sense, the beneficiary makes the decision. Neither case deals with the fiduciary relationship between the federal government and an Indian band, however, and therefore *Apsassin* must be considered the leading authority on the question of the Crown's pre-surrender fiduciary obligations. In reviewing that case, we cannot imagine that McLachlin J intended to say that the mere fact that a vote has been conducted in accordance with the surrender provisions of the *Indian Act* precludes a finding that a band has ceded or abnegated its decision-making power. If that is the test, it is difficult to conceive of any circumstances in which a cession or abnegation might be found to exist.
>
> We conclude that, when considering the Crown's fiduciary obligations to a band, it is necessary to go behind the surrender decision to determine whether decision-making power has been ceded to or abnegated in favour of the Crown. In our view, a surrender decision which, on its face, has been made by a band may nevertheless be said to have been ceded or abnegated. The mere fact that the band has technically "ratified" what was, in effect, the Crown's decision by voting in favour of it at a properly constituted surrender meeting should not change the conclusion that the decision was, in reality, made by the Crown. Unless the upshot of Justice McLachlin's analysis is that the power to make a decision is ceded or abnegated *only* when a band has completely relinquished that power in *form* as well as in *substance*, we do not consider the fact of a band's majority vote in favour of a surrender as being determinative of whether a cession or abnegation has occurred. Moreover, if the test is anything *less* than complete relinquishment in form and substance, it is our view that the test has been met on the facts of this case – the Band's decision-making power with regard to the surrender was, in effect, ceded to or abnegated in favour of the Crown.[294]

Although we are not dealing with the surrender of reserve land in this case, the Supreme Court of Canada decision in *Opetchesaht* confirms that these principles also apply by analogy to the exercise of the Crown's discretion in the granting of a permit under section 28(2) of the *Indian Act*. This is clear from the following statement of Mr Justice Major in *Opetchesaht*:

> It is important that the band's interest be protected but on the other hand the autonomy of the band in decision making affecting its land and resources must be promoted and respected . . . With the twin policies of autonomy and protection in mind, s. 37 and s. 28(2) reflect that, depending on the nature of the rights granted, different levels of autonomy and protection are accorded. Section 37 demonstrates a high degree of protection, in that the approval of the Governor in Council and the vote of all of the members of the band are required. This indicates that s. 37 applies where

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[292] *Norberg v. Wynrib*, [1992] 4 WWR 577 at 622-23 (SCC), McLachlin J.
[293] *Hodgkinson v. Simms*, [1994] 9 WWR 609 at 645 (SCC), La Forest J.
[294] Indian Claims Commission, *Kahkewistahaw First Nation Report on 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997), pp. 114-15. Emphasis in original.

> significant rights, usually permanent and/or total rights in reserve lands are being transferred. On the other hand, under s. 28(2), lesser dispositions are contemplated and the interest transferred must be temporary.[295]

In her minority decision in *Opetchesaht*, Justice McLachlin expressed the view, in *obiter*, that the Crown also has a fiduciary duty in the context of an expropriation of reserve land:

> The only other way [aside from a surrender under section 37] Indian interests in reserve land can be permanently disposed of under the *Indian Act* is by expropriation. *Where the greater public good so requires, interests in reserve land may be expropriated: s. 35. The procedure is strictly regulated and subject to consent of the Governor in Council, exercised by Cabinet, which owes the Indians a fiduciary duty to act in their best interests.* The process is politically sensitive and open to public scrutiny.[296]

Furthermore, as counsel for Canada and the First Nation observed in their submissions, Mr Justice Urie confirmed in the *Kruger* decision that the Crown owes a fiduciary duty to a band where its reserve land is expropriated under the *Indian Act*:

> . . . it is clear that what was said by Dickson J., in the *Guerin* case was related to a fiduciary relationship in the context of that case, i.e., where there was a surrender of Indian lands to the Crown on certain terms, which terms were changed by the Crown without consultation with or approval by the Indians. . . . Nevertheless, for the purposes of this appeal I am prepared to accept that the principle propounded by Dickson J., applies. When the Crown expropriated reserve lands . . . there would appear to have been created the same kind of fiduciary obligation, *vis-à-vis* the Indians, as would have been created if their lands had been surrendered. *The precise obligation in this case was to ensure that the Indians were properly compensated for the loss of their lands as part of the obligation to deal with the land for the benefit of the Indians*, just as in the *Guerin* case, the obligation was to ensure that the terms of the lease were those agreed to by the Indians as part of the general obligation to them to ensure that the surrendered lands be dealt with for their use and benefit. *How they ensured that lies within the Crown's discretion as a fiduciary and so long as the discretion is exercised honestly, prudently and for the benefit of the Indians there can be no breach of duty.*[297]

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[295] *Opetchesaht Indian Band v. Canada* (1997), unreported, SCR, file no. 24161, pp. 21-22, Major J.

[296] *Opetchesaht Indian Band v. Canada* (1997), unreported, SCR, file no. 24161, p. 13, McLachlin J.

[297] *Kruger v. The Queen*, [1985] 3 CNLR 15 at 41 (FCA), Urie JA. Emphasis added.

Applying this reasoning to the case before us, it is our view that the Crown's fiduciary obligations in relation to the surrender of reserve land also apply by analogy to the present situation because the same twin principles of autonomy and protection are inherent in sections 28(2) and 35 of the *Indian Act*. Thus, in the case of the section 28(2) permit, the 1970 agreement could not have any legal effect without the consent of the Minister and the issuance of the permit. In a similar vien, consent of the Governor in Council was also required for the expropriation under section 35 before lands could be transferred in accordance with the terms agreed to between the NBWA and the Band Council. Under the circumstances, the Crown had a fiduciary duty to protect the Band from being exploited in the process leading up to the 1970 agreement and in the exercise of its discretion to consent to a section 28(2) letter-permit and expropriation of reserve land under section 35.

Based on the foregoing, our analysis of Canada's fiduciary obligations in this case must answer the following three questions:

1 Was the Eel River Band's understanding of the terms of the 1970 agreement inadequate or did the conduct of the Crown taint the dealings in a manner which would make it unsafe to rely on the Band's understanding and intention?

2 Did the Eel River Band effectively cede or abnegate its power to make decisions with respect to the use or disposition of its reserve land?

3 Was the 1970 agreement "foolish, improvident or exploitative" such that the Minister of Indian Affairs and the Governor in Council should not have consented to the letter-permit and expropriation?

We will address each of these questions in turn.

Where a Band's Understanding Is Inadequate or the Dealings Are Tainted

It was submitted on behalf of the First Nation that the Crown breached its fiduciary duty because it did not negotiate on behalf of the Band and failed to assist it by interposing itself between the Band and third parties as is required by a fiduciary. Furthermore, the Crown failed to provide independent legal advice to the Band which impugns the 1970 agreement because "some knowledge of one's legal rights is a prerequisite to a valid and fair acquiescence in an important and legally binding transaction such as the disposal of reserve land."[298]

We accept that if it can be found that the Band Council did not understand the nature or import of the negotiations, or was not kept informed of what was going on, a breach of Canada's fiduciary obligation might be the result. We are unable, however, to find that the Band's representatives in these negotiations did not understand the nature and foreseeable consequences of entering into the 1970 agreement. The 1970 agreement was the culmination of over seven years of protracted negotiations between the Band and the Indian Affairs Branch, on one hand, and the Town of Dalhousie and the NBWA, on the other. The documentary record provides ample evidence that the Band's representatives were involved at every stage of the negotiations and that they had a full and adequate understanding of the terms of the 1970 agreement.

At the outset, although the Band expressed opposition to the dam project on the grounds that it would have an adverse effect on the Band's fisheries and therefore its livelihood, the Band's representatives also viewed the project as having a potential benefit for the Band. As McKinnon reported in 1963, the Band was interested in the possibility of employment in industries related to the dam because they would be year-round rather than seasonal, and because they could be more secure than the income provided by the fluctuating clam stocks. The Band also sought to influence the site at which the dam was developed, since it believed that the upriver site would result in less damage to the clam stocks than the site at the mouth of the river.[299] None of this is to suggest that the Band was an ardent advocate of the dam, but rather that it saw some potential benefit to the project and attempted to influence the means by which it was established and the benefits that would flow to its members from its construction.

From the time that the dam was first proposed, representatives of the Band actively participated in negotiations to allow construction to proceed. The record also shows that, from the very start, the Band was crystal clear in its understanding that construction of the dam would have a potentially devastating effect on the clam fishery. It was the Band that brought this aspect of the proposal to the attention of the IAB to ensure that it was taken into consideration in the compensation negotiations. The Band asserted this view despite the opinions of various government authorities, including Dr Medcof in 1963, that the dam's effect on the fisheries was either uncertain or would be negligible.[300] The Band also participated in developing the strategy by which it would resist Site no. 2 as the location for the dam, through the use of expert opinion and by refusing to allow the authorities onto reserve land to conduct preliminary surveys.[301]

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[298] Submissions on Behalf of the Eel River Bar First Nation, February 13, 1997, p. 38.

[299] J.H. Sheane, Superintendent, Miramichi Indian Agency, to Maritime Regional Office, November 26, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 157).

The Band continued to be an active participant in the negotiations for the settlement of the dam project. It addressed its concerns directly to the town, and later the NBWA, and to the IAB to deal with those concerns on its behalf. The Band's participation in the negotiations is indicated by, among other things, the following:

- The Band took the initial position of opposing the dam's establishment at Site no. 2, which either coincidentally or indirectly resulted in the town opting to develop the dam at Site no. 1.
- The Band made its views clear at several meetings over the course of the negotiations, some of which were convened by the Band and held without the presence of IAB officials.[302] On none of these occasions, as we describe below, could the Band's representatives be said to be expressing anything other than the Band's position and advocating in the Band's interests. Nor is there any indication from these discussions that the Band was not capable of representing its own interests.
- The Band was instrumental in assessing and advancing its views on the appropriate level of compensation, in making several proposals and estimates, and in proposing or agreeing to the use of a third-party expert to make the final assessment.[303]

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[300] F.B. McKinnon, Regional Supervisor, Maritime Regional Office, Indian Affairs Branch, to Acting Chief, Reserves & Trusts, Indian Affairs Branch, February 27, 1962, DIAND file 271/31-5-3-1, vol. 1 (ICC Documents, p. 146).

[301] J.M. Sheane, Superintendent, Miramichi Indian Agency, to V.J. Caissie, Assistant Regional Supervisor, Maritime Regional Office, September 24, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 146).

[302] Meeting of January 21, 1963 (Town, IAB, Band); of March 28, 1963 (Town, Band); of April 9, 1963, at which the Band Council Resolution was passed (Town, IAB, Band membership); meeting to deal with problems with the work currently being done (Sheane's letter of June 4, 1963) (Town, IAB, Band); meeting to discuss the lack of jobs being produced pursuant to the 1963 Band Council Resolution, requested by the Band and held on April 23, 1964 (Town, IAB, Band); meeting of April 5, 1966 (Town, IAB, Band Councillor); meeting of May 18, 1966 (Town, IAB, Band); see also ICC Exhibit 3, being minutes from various meetings with the Town and/or the IAB; ICC Documents, p. 363, relates a conversation between Wallace LaBillois and the NBWA; ICC Documents, p. 384, is MacNutt's letter indicating that the memorandum "was based on negotiations directly with the Band"; J.H. MacAdam, Administrator of Lands, to P. MacNutt, Solicitor, Department of Justice, Fredericton, New Brunswick, January 9, 1969, DIAND file 271/31-5-13-3-1, vol. 2 (ICC Documents, p. 393), indicates that the final agreement had been submitted for approval by the Band.

[303] F.B. McKinnon, Regional Supervisor, Maritime Regional Office, to Indian Affairs Branch, April 1, 1963 (ICC Documents, pp. 186-91). Report on his meeting with the Band to determine fair compensation.

- The Band also participated in the dispute resolution process with the town and the NBWA once good faith began to break down on the question of jobs, making further suggestions about how to deal with this problem, and also taking a hard line with the town.[304]

In our view, the Band's representatives were well aware of the nature of the dealings surrounding the dam and the implications of the transaction. At its worst, the construction of the dam meant the total destruction of the Band's livelihood drawn from the fisheries in Eel River Cove. At the same time, the potential was there for enhanced employment opportunities in the industries in and around the Town of Dalhousie, and the Band Council sought to capitalize on this possibility in the negotiations. The evidence is abundant that, for whatever reason, be it lack of effort, systemic discrimination, or conditions totally beyond the control of the parties to the contract, employment for Band members was never obtained in any meaningful way despite the commitments made by the Town of Dalhousie in 1963. Nevertheless, protracted negotiations between the Band, Canada, and the NBWA culminated in the 1970 agreement, which provided for payment of a substantial amount of compensation to the Band. In lieu of employment, it is significant that the Band obtained a commitment from the NBWA that it would pay an annual fee for water pumped to a maximum of $27,375 per year, and that this agreement would be subject to renegotiation after 20 years. Under the circumstances, therefore, we cannot find that the Band did not understand the nature and consequences of this transaction in such a way that we should deny its effectiveness.

In so concluding, we must also have regard for the evidence adduced at the community session that, among other things, it was never clear to the Band at the time what the effect on the fishery would be;[305] no independent legal advice was provided to them;[306] and various members of the Band were not aware of the nature of the negotiations surrounding the dam. As we have indicated above, none of the parties, including Dr Medcof, were entirely sure of what the effect on the fishery would be. The Band agreed, however, to allow construction of the dam to proceed at Site no. 2 on the understanding that Dr Medcof and the Fisheries Research Board would determine the extent of the Band's losses with respect to the clam and smelt harvests for the purposes of determining compensation. Since the Band was primarily interested in creating employment opportunities, it was agreed that the town would be entitled to a 5 per cent reduction from the compensation payable to the Band for every male Band member hired by the town or local industry. We intend to come back to the second point dealing with the issue of independent legal advice later in the report. Finally, we are not convinced that knowledge and understanding of the issues surrounding the dam was limited to the Band Council, since there was a general band meeting in 1963 which resulted in 24 out of 25 eligible voters supporting the terms of the 1963 Band Council Resolution. Furthermore, given the protracted nature of these negotiations, it is fair to assume that this subject would have been informally discussed by members of the Band on numerous occasions. Even if we were to accept that many Band members were not aware of the details of the 1970 agreement, it is not our place to question the authority of those nominated by the Band to represent it in these negotiations, nor have we specifically been asked to question such authority. We therefore decline to do so.

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[304] F.B. McKinnon, Regional Director of Indian Affairs, Maritime Regional Office, to Indian Affairs Branch, April 27, 1964, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, pp. 258-59). McKinnon wrote letters to various parties at the suggestion of the Band; also meetings convened on April 5, 1966, and May 18, 1966, to discuss the problems; also ICC Documents, p. 292, Minutes of May 1, 1968, meeting indicate that "the Indians and Indian Affairs officials" had both been speaking with the mill's management to address employment issues (ICC Exhibit 3, p. 2).

[305] ICC Transcript, April 23, 1997, p. 67 (Peter Simonson); ICC Transcript, April 23, 1997, p. 77 (Alfred Narvie).

[306] ICC Transcript, April 23, 1997, p. 67 (Alfred Narvie).

Having concluded that the Band Council had a full and adequate understanding of the terms of the 1970 agreement, it still remains to be considered whether the conduct of the Crown's agents tainted the dealings in such a way that it would be unsafe to rely on the agreement as an expression of the understanding and intention. In considering this question, we note that in our reports on Kahkewistahaw and Moosomin the dealings between Canada and the bands were rife with improper motivations on Canada's part. These dealings were "tainted," in particular, by the fact that Canada had a significant and overpowering political interest in securing the surrenders of the reserve land that had been set aside for the claimant Bands in those cases. Given this significant conflict of interest between the interest of the Band and the interests of third parties, and given that Canada had utterly failed to achieve any sort of balance among those competing interests, we were compelled to find that Canada's fiduciary obligations had not been properly discharged.

The present case is quite different. Unlike the circumstances in Kahkewistahaw and Moosomin, the dealings in this case were initiated not by the Band or by Canada, but by the Province of New Brunswick and by the Town of Dalhousie. Nor is there any evidence that the federal Crown was operating under any conflict of interest or pressure to champion the cause of the province or the town. Instead, both the Band and Canada were in a position to adequately respond to the actions taken by the province and by the town, who were acting in their own self-interest without regard to the effect that this project might have on the Band.

From the time that construction of the dam was first proposed in 1962 until the negotiations culminated in the signing of the 1970 agreement, Indian Affairs officials acted consistently and persistently to protect the Band's interests. Throughout these protracted negotiations, Indian Affairs officials acted as articulate and forceful advocates on behalf of the Band. We find further that, to the extent permitted by its duty to the Canadian public as a whole, it acted *solely* in the interests of the Band.

At the outset, when the province and the town were at the stage of casting about for ways to fulfil Premier Robichaud's promise to provide 300,000 more gallons of fresh water per day to the Town of Dalhousie, the IAB spoke out on behalf of the Band to ensure that those parties responsible for planning this project would take the Band's interests into account.[307] Although at the time the Fisheries Research Board suggested that the clam flats at risk were not of much value, the Band said that it obtained 50 per cent of its clam production from these flats. The IAB accepted the Band's position and acted, from the start, as a steadfast advocate of the Band's interests.

It is also important to reiterate that the Band Council viewed the dam project as potentially beneficial because the project might result in enhanced employment opportunities for members of the Band. Accordingly, at the outset, the Band did not completely oppose the dam project, although it did oppose construction at Site no. 2, but rather sought to find a way to minimize the dam's potential impact on the fisheries, while at the same time maximizing its potential benefit to the Band.

Canada and its agents, and in particular McKinnon and Sheane and their successors, advocated on behalf of the Band by, among other means:

- obtaining, in consultation with the Band, expert advice to help persuade the province and the town of the negative impact that the dam would have on the Band if it was situated at the mouth of the cove;[308]

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[307] F.B. McKinnon, Regional Supervisor, Maritime Regional Office, Indian Affairs Branch, to Acting Chief, Reserves and Trusts, Indian Affairs Branch, February 27, 1962, DIAND file 271/31-5-13-1, vol. 1 (ICC Documents, p. 126).

[308] J.M. Sheane, Superintendent, Miramichi Indian Agency, to V.J. Caissie, Assistant Regional Supervisor, Maritime Regional Office, September 24, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 146).

- continuing to advocate for the Band's preference for the upriver site in the face of expert evidence concluding that there would be no significant difference between the two sites;[309]
- cultivating in the NBWA and the town a responsibility for compensating the Band's potential losses resulting from the dam project, although it was unclear whether the Band had any legal claim to such compensation, since it was not clear what the nature and scope of the Band's treaty and riparian rights were;[310]
- forwarding in a reasonable and responsible fashion the Band's assessment of its potential losses and retaining an expert third party to determine its actual losses to the clam harvest as a result of the dam;
- forwarding in a reasonable and responsible fashion the Band's goals with respect to compensation – namely, that the compensation should take the form of permanent employment for Band members;
- attempting to negotiate with and/or pressure the town, local employers and unions, and the NBWA to make efforts to find employment for the Band's members to aid the town in fulfilling its undertaking to do so; and
- negotiating on the Band's behalf to attempt to achieve a fair settlement, and seeking amendments to various provisions of the agreement to protect the Band's interests.

There is no question, in our view, that the negotiations surrounding the dam were very difficult. The protracted nature of these negotiations resulted in great hardship for the Band as it waited for the town and for the NBWA, respectively, to fulfil the obligations they had undertaken in good faith at the commencement of the negotiations, particularly with respect to employment for the Band's members. These hardships, however, were not the result of any dereliction of duty on the part of the Indian Affairs Branch or its agents. We find that, throughout the course of negotiations, the IAB and its agents conducted themselves properly, acted in the sole interests of the Band, and did not allow themselves to be compromised in any way.

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[309] J.H. Sheane, Superintendent, Miramichi Indian Agency, to Maritime Regional Office, November 26, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 157).

[310] Jules D'Astous, Chief, Economic Development Division, Indian Affairs Branch, Department of Citizenship and Immigration, Ottawa, to Regional Supervisor, Maritimes, December 18, 1962, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, pp. 162-63).

In arriving at this conclusion, we are fully aware that it may ring hollow simply to find that it was "not Canada's fault" that other parties failed to fulfil their responsibilities and undertakings. The hallmark of a fiduciary analysis, however, is, as the Band pointed out, not to hold the fiduciary to a standard of perfection measured with 20/20 hindsight. Therefore, even though it could be argued that the Crown ought not to have allowed construction of the dam to proceed in the absence of a binding agreement on compensation in the form of employment for members of the Band, we must consider what was reasonable at the time. In our view, it was not unreasonable for Canada to allow construction to proceed on the basis of the 1963 Band Council Resolution because it appeared that the parties involved had an intention, in good faith, to meet the obligations they had undertaken. It was also agreed that the extent of the dam's effect on the Band's fishery could only be determined after a number of surveys were completed between 1963 and 1967. Although the promises of the town and the NBWA with respect to compensation and employment remained unfulfilled until at least 1970, there is no evidence that the conduct of Indian Affairs officials constituted a dereliction of duty for which Canada must now be held responsible.

We stated at the outset that we could not conclude that Canada had an interest in forwarding the dam project; it was pursued by the province and by the town. Accordingly, we find that there was no conflict of interest between Canada and the Band. It is true, as the First Nation contended, that in 1966 the Band requested a meeting with a lawyer when relations with the town surrounding the employment issue began to deteriorate.[311] What was sought, however, was a meeting with a "legal officer of the branch," not independent counsel, to discuss the status of the agreement with the town and what legal recourse was available to the Band. For reasons that are unclear, there is no evidence that this meeting ever occurred. Shortly afterwards, however, Dr Medcof completed his third and final survey on clam populations, and Indian Affairs continued to press for the payment of fair compensation to the Band. The evidence also discloses that the Band intended to meet with experts of its own choosing to assess its position with respect to the dam.[312] Again, there is no evidence that any such meeting occurred, but it is clear that the Band did not view itself as unable to seek advice independent of that provided by

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[311] Submissions on Behalf of the Eel River Bar First Nation, February 13, 1997, p. 28.

[312] R.M.J.J. Guillas, Superintendent, Miramichi Indian Agency, to J.H. MacAdam, Administrator of Lands, Indian Affairs Branch, Department of Indian Affairs, Ottawa, Ontario, January 23, 1970, DIAND file 271/31-5-13-3-1, vol. 3 (ICC Documents, p. 446).

Canada. Based on the entirety of the evidence before us, we find that there was no duty on Canada to provide independent legal advice.

Since there is no evidence of an actual conflict of interest between Canada and the Band on the facts before us, Canada was under no obligation to provide independent legal advice to the Band to ensure that the latter's interests were properly represented. Canada's obligation was to advise and inform the Band of the nature and foreseeable consequences of the transaction. To fulfil this obligation, Indian Affairs sought and obtained legal and technical advice on behalf of the Band and acted in a responsible and prudent manner throughout the negotiations. Moreover, the Band was aware that it could seek independent legal advice, but chose not to for reasons which are not entirely clear from the record.

With regard to the terms of the 1970 agreement, we find the following words of Urie JA in *Kruger v. The Queen* to be apt:

> In essence, however unhappy [the members of the Band] were with the payments made, they accepted them. The payments were for sums which could be substantiated by the independent valuations received by both parties and which were determined after extensive negotiations and forceful representations on the Indians' behalf by the Indian Agent and other high officials of the Indian Affairs Branch. *If the submissions advanced by the appellants were to prevail, the only way that the Crown could successfully escape a charge of breach of fiduciary duty in such circumstances would have been, in each case, to have acceded in full to their demands or to withdraw from the transactions entirely. The competing obligations on the Crown could not permit such a result.* The Crown was in the position that it was obliged to ensure that the best interests of all for whom its officials had responsibility were protected. The Governor in Council became the final arbiter. *In the final analysis, however, if the appellants were so dissatisfied with the expropriations and the Crown's offers, they could have utilized the Exchequer Court to determine the issues.* For whatever reasons, they elected not to make these choices. They accepted the Crown's offers and, at least *in the case of Parcel B, the offer was at the figure which they had suggested.* I fail to see, then, how they could now successfully attack, after so many years, the settlements to which they agreed.[313]

Kruger was clearly decided in the context of an expropriation in which the federal Crown was also the expropriating authority. In the present case, Justice Urie's reasons are even more compelling because Canada was not required to balance competing interests as it was in *Kruger*. It was merely required to discharge its duties as fiduciary, and it did so by acting in the best interests of the Band throughout the entire negotiation process.

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[313] *Kruger v. The Queen*, [1985] 3 CNLR 15 at 51 (FCA), Urie JA. Emphasis added.

In summary, we conclude that there is simply no evidence that the IAB pursued any interest other than that of the Band. Moreover, we have no hesitation in finding that, in this case, Canada's representatives acted honestly, prudently, and for the benefit of the Eel River Band. Accordingly, although the Band suffered hardships in the course of achieving a settlement, these were not the product of a breach of fiduciary duty or an abdication of the Crown's responsibilities. We find that Canada's conduct in the course of these negotiations was in no way "tainted," as contemplated in *Apsassin*, such that it would be unsafe to rely on the 1970 agreement as an expression of the Band's true understanding and intention. Therefore, in the absence of compelling evidence that the Band did not fully understand the nature of the 1970 agreement or that the Crown's conduct somehow tainted the dealings, the intention-based approach enunciated by Gonthier J in *Apsassin* must prevail because "the law treats Aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured."[314]

Where a Band Has Ceded or Abnegated Its Power to Decide

In *Apsassin*, McLachlin J, in arriving at her conclusion that the appellant bands had not abnegated their power to decide whether to surrender reserve land, took note of the following facts, as found by the trial judge:

> 2. That they had discussed the matter previously on at least three formal meetings [sic] where representatives of the Department were present;
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> . . .
>
> 4. That, at the surrender meeting itself, the matter was fully discussed both between the Indians and with the departmental representatives previous to the signing of the actual surrender;
> 5. That [Crown representatives had not] attempted to influence the plaintiffs either previously or during the surrender meeting but that, on the contrary, the matter seems to have been dealt with most conscientiously by the departmental representatives concerned;
> 6. That Mr. Grew [the local Indian agent] fully explained to the Indians the consequences of a surrender . . .[315]

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[314] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 at 31 (SCC).

[315] *Blueberry River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1995] 4 SCR 344.

Accordingly, in McLachlin J's view, the balance between the Band's autonomy and the Crown's protective obligation did not demand that Canada *make a decision* on behalf of the Band. Rather, Canada was required to provide the Band with the necessary tools and information to make the decision itself. Based on the facts before the trial judge, McLachlin J found that the Crown had discharged this obligation.

We find that, on the facts before us, we must arrive at the same conclusion. There is no evidence that the Band Council was in a position that rendered it unable to make a decision about the dam project. Instead, as already described above, we find that the Council was a capable and persistent advocate of its own rights and interests. Any decisions made were genuinely its own, even though they were made with the assistance of the IAB and others. Therefore, we conclude that the Band did not cede or abnegate its power to make decisions with respect to the use or disposition of its reserve land.

Duty of the Crown to Prevent an Improvident or Exploitative Transaction

We have previously considered the Band's position as a negotiator and a party with regard to the *procedural* aspects of the transaction. The final ground which we must consider is the *substantive* result of the settlement. As described above, the Governor in Council has an obligation to reject a deal that is "foolish, improvident or exploitative," regardless of any consent given to it by a Band. In essence, this obligation, arising from the Crown's protective role towards Indian Bands, requires the Minister of Indian Affairs or the Governor in Council, as the case may be, to refuse consent to a deal that is foolish, improvident, or otherwise exploitative.

To determine whether consent was properly given to this transaction, we must determine whether, given the circumstances, the consideration flowing to the Band as a result of the 1970 agreement was inadequate when viewed from the perspective of the Band at the time. The First Nation has submitted that it was inadequate, and relies on two grounds: first, that employment was not a term of the 1970 agreement, and, second, that compensation was limited in the 1963 Band Council Resolution to seven years' losses. The First Nation has also pointed to the terms of the 1995 agreement as evidence that the 1970 agreement was inadequate.

For its part, Canada submits that the compensation ultimately provided in the 1970 agreement was adequate to compensate the Band for the losses to its fishery and for the use of the land, and that no evidence has been advanced that the amounts agreed to were unreasonable.

To assess these positions, we find it necessary to compare the various proposals. In doing so in Table 1, we also take note of the fact that these negotiations never contemplated a straight cash settlement, but instead consisted of various proposals of land exchange, employment, development opportunities, cash, and reversionary interests in land.

Table 1
Comparison of Terms in the 1963 Band Council Resolution and the 1970 Agreement

Terms	1963 Band Council Resolution	1970 Agreement
Land	$4000 for ±49 acres (±$81/acre)	$15,000 for ±115 acres (±$130/acre)
Compensation for damages	Loss of clams to be compensated at the rate of $1.50 per pail reduction in total clam harvest x 7 (years) x ½ (representing the Band's ½ interest in the total clam fishery), to a maximum of $50,000	$25,000 for damage, injury, and losses caused by erection and operation of dam, water supply system, and Eel River headpond
Pumpage fee	None	One-time payment of $9,591.12 plus annual payment for water pumped of at least $10,000, but not to exceed $27,375, for 20 years ($200,000 to $547,500)
Type of transfer	Expropriation	Section 28(2) permit for pipeline, pumphouse, and access road and expropriation of headpond (reversionary interest to all land)
Employment provisions	For every male Indian who obtained full-time permanent employment, the compensation for damage to the fishery would be reduced by 5 per cent	None
Other	Feasibility study to create trout fishing pool to attract tourists	Band retains right to erect and maintain a commercial marina on reserve lands adjacent to headpond
Total cash	Maximum of $54,000; no reversionary interest in any land	$249,591.12 to $597,091.12, with reversionary interest to all of the land

It is clear that the 1970 agreement resulted in a far higher cash settlement to the Band than that contemplated by the 1963 Band Council Resolution. As submitted by the First Nation, the fact that a higher amount was ultimately paid to the Band under the terms of the 1970 agreement is not necessarily conclusive evidence that the amounts agreed to by the Band were not exploitative. This question, however, can be determined by considering Dr Medcof's analysis of the losses to the fishery as a solid basis for comparison.

In 1963, the parties agreed that it was necessary to have the Band's actual losses assessed by an expert in the field because it was unclear whether the dam would affect the fishery or, if it did, in what way. Accordingly, it would have been imprudent for the parties to tie themselves down to a figure without an assessment of the actual losses. For this reason, it was agreed that Dr Medcof, with the assistance of his staff, would conduct this assessment. Although it has been submitted that Dr Medcof "angered" the Band by some of his initial assumptions,[316] it has not been argued before us that Dr Medcof was anything other than an objective expert in the field. Indeed, given the personal comments he added to his final survey, on which the Band relies, we find that Dr Medcof was solely motivated to provide a report that fairly and fully recognized the Band's real losses. The adequacy of compensation provided for in the 1970 agreement can, at least to some extent, be assessed by reference to his surveys, on which the parties relied.

In the surveys submitted by Dr Medcof, he wrote that he had been asked to make two findings: whether any reduction in the clam harvest was the direct result of the damming of the Eel River, and "the fairest assessment" of the losses sustained by the Indian fishery.[317] He concluded that the losses he identified were the direct result of the dam. In providing an answer to the second question, he noted that there were four possible ways to calculate the Band's losses, ranging from 742 pails to 10,094 pails (both figures including the seven-year factor). The last figure, in his view, was the fairest because, rather than starting from the pre-dam presumption that Indians constituted half of the users of the fishery, it embodied the actual losses suffered by the Band. Because of a number of factors, including the increase in non-Indian fishers in the area, this loss was, in fact, approximately 70 per cent of the pre-dam landings taken by the Band, a loss represented by the 10,094 pails.

A quick calculation shows that 10,094 pails at $1.50 per pail is $15,141.00. The 1970 agreement provides for $25,000. On the face of it, the 1970 agreement exceeds the amount that would have been arrived at following Dr Medcof's calculations. Even if it were assumed that the average pre-dam annual income was *totally* lost (which was not Dr Medcof's projection, since he viewed it as likely that landings would continue at an average of 620 pails per year), the figure would be $21,651.

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[316] Submissions on Behalf of the Eel River Bar First Nation, February 13, 1997, p. 28.

[317] J.C. Medcof, Fisheries Research Board, Biological Station, St Andrews, NB, "Third Survey of Eel River Cove, N.B., Soft-Shell Clam (Mya arenaria) Population," November 1967 (ICC Exhibit 2, tab 20), p. 41.

The Band has submitted, however, that the lack of fairness and equity in the compensation provided for in the 1970 agreement is "best articulated" by Dr Medcof's confidential comments attached to his final clam survey.[318] It will be recalled that Dr Medcof was of the opinion that the 1963 Band Council Resolution favoured the interests of the town over the Band's in three ways:

> (1) The town was to get an advantage and benefit; the Indian Band was to get only conditional compensation for possible losses. (2) The town's benefit was to be indefinitely continuing; the Indians' compensation was to be partial and was to cover only seven years' possible losses. (3) The dollar value of the town's investment in the dam would be expected to increase when dollar values of real estate increased, whereas the per-pail price for clams ($1.50) was fixed in the terms of the contract.[319]

Starting with the last concern first, we note that, by the time Dr Medcof conducted his survey, the per-pail price of clams had risen 50 per cent to $2.25. The value of 10,094 pails at $2.25 per pail is $22,711.50. As noted above, the 1970 agreement provided for $25,000 in compensation.

Second, Dr Medcof considered it to be unfair that the Band was receiving compensation for only seven years' losses, while the town would receive an indefinitely continuing benefit. The aspiration of the parties at the time was to substitute permanent industrial employment for male members of the Band for the income derived from the clam fishery. Whether as a result of systemic discrimination, high unemployment, or any of the other factors we have referred to above, jobs were not provided for Band members. This fact by itself does not mean that Canada's fiduciary obligation was not discharged. What it did mean, however, was that the Band was left with a significantly reduced fishery and no jobs to replace it. Having said that, it was not patently unreasonable for the parties to limit compensation for lost income to seven years because they likely assumed that it would take up to seven years for members of the Band to find alternative sources of employment to replace their lost income from the fishery. In any event, it is not reasonable to expect compensation for lost income to continue indefinitely because such an arrangement would provide little or no incentive for individuals to mitigate their damages by seeking alternative sources of employment.

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[318] Submissions on Behalf of the Eel River Bar First Nation, February 13, 1987, p. 36.

[319] J.C. Medcof, Assistant Director, Fisheries Research Board, Biological Station, St Andrews, NB, to F.B. McKinnon, Regional Supervisor, Indian Affairs Branch, Amherst, NS, December 27, 1967, DIAND file 271/31-5-13-3-1, vol. 1 (ICC Documents, p. 323).

In the final analysis, Dr Medcof's concerns about the inequities of the 1963 Band Council Resolution were effectively accounted for in the 1970 agreement. In addition to the $25,000 lump sum, the 1970 agreement provides for a yearly pumpage fee of between $10,000 and $27,375, depending on the amount of water pumped out of the reservoir. That is, the Band received a lasting benefit that was directly tied to the benefit that would enure to the town in the form of water pumped from the Eel River headpond.[320] In so concluding, we do not rely on the "improvements" between the 1970 agreement and the 1963 Band Council Resolution as demonstrating that the 1970 agreement was not exploitative. Instead, we rely on the yardstick provided by the objective determination of the Fisheries Research Board through Dr Medcof.

The First Nation has submitted that, because the 1970 agreement did not provide for any employment for its members, it was exploitative. We cannot agree. In our view, the historical record makes it clear that, by the end of the difficult negotiations, neither the Band nor Canada was inclined to rely on either the town or the province to provide any employment for members of the Band. Their experience with the town was bitter and eventually prompted a desire on the part of the Band to "seek full compensation for their losses." We do not find anything exploitative in this approach. Indeed, it appears to have been a reasonable and prudent response to the intractability of the town.

Although our comments in this section focus on the substance of the deal struck in 1970, we also must comment briefly on the process immediately preceding the conclusion of the agreement. The First Nation has submitted that, when Canada discovered, on January 23, 1970, Wallace LaBillois's direct communication with the Chairman of the NBWA that the Band wished to have no further negotiations, but wished, instead, to conclude the transaction immediately, Canada should have been alert to the possibility of exploitation.[321] In our view, it was. In their review of the proposed agreement, Canada's representatives identified three concerns: the adequacy of the release clause; the nature of the access to reserve land that would be permitted to the NBWA's workers to maintain the pipeline; and the fact that, although water had already been pumped out of the reservoir, the Band was not going to receive compensation under the annual pumpage fee clause.

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[320] The notes of the meeting held on June 21, 1968, also suggest that the pumpage fee was intended to be linked to the loss of annual income: "clams fish etc." is written next to "0.5 per thousand gal" (ICC, Exhibit 3, p. 10).

[321] Submissions on Behalf of the Eel River Bar First Nation, February 13, 1997, p. 58.

Although the Band was no doubt exasperated with the process and anxious to conclude the agreement so it could receive some compensation after so many years, Canada was not prepared to accept the agreement without resolving these concerns. It is also true that the NBWA was bargaining hard and proved unwilling to accept some of the changes sought by Canada. Canada, as a fiduciary faced with a situation where its beneficiary sought immediately to sign the agreement, and where the other party was proving difficult, slowed the process down and sought to resolve its own concerns before accepting the agreement. We find that this conduct was prudent and reasonable on Canada's part.

After a thorough review of the circumstances leading up to the signing of the 1970 agreement, we conclude that the compensation package negotiated and received by the Band did not constitute an improvident or exploitative transaction. The negotiations were protracted and various proposals for compensation were put forward by all parties, including the Band. All apparent heads of damage were considered during the course of negotiations and, although compensation was not provided to the Band in the form of employment, the annual pumping fee provided a substantial and lasting benefit to the Band. At the end of the day, the Band Council decided to sign the 1970 agreement after a mature consideration of its options, and it was not for the Crown to substitute its own decision for that of the Band's unless the deal was considered to be exploitative. For the reasons stated above, we conclude that the terms of the 1970 agreement were not foolish, improvident, or otherwise exploitative.

PART V

CONCLUSIONS AND RECOMMENDATION

CONCLUSIONS

The Commission has been asked to inquire into and report on whether the Government of Canada properly rejected the specific claim submitted by the Eel River Bar First Nation. To determine whether or not the claim discloses an outstanding lawful obligation owed by Canada to the First Nation, we addressed the issues under three sections. The first dealt with the nature and extent of the First Nation's fishing rights and whether construction of the dam infringed upon those rights. The second considered whether the Crown breached its statutory obligations under the *Indian Act* by granting a letter-permit and by consenting to the expropriation of the Eel River reserve lands in 1970. Finally, we considered the nature and extent of the Crown's fiduciary obligations on the facts of this case.

Our findings are summarized below.

Issue 1 Nature and Extent of Fishing Rights

The Treaty of 1779 guaranteed that the Micmac Indians would have the right to remain "Quiet and Free from any molestation of any of His Majesty's Troops or other his good Subjects in their Hunting and Fishing." It was not disputed that members of the First Nation were entitled to exercise fishing rights in and around the Eel River Bar Reserve as their ancestors have since time immemorial. Without further evidence and submissions on the historical context of the Treaty of 1779, however, the Commission cannot make any definitive findings on the nature and scope of the First Nation's treaty rights, or on whether the 1807 Order in Council establishing the reserve modified or placed any limitations upon the exercise of these rights. Nevertheless, the evidence supports a finding that the First Nation's treaty fishing rights were infringed upon by the construction of the dam on the Eel River in 1963 because it interfered with the right to fish free from any interference on the part of the Crown.

We acknowledge and agree with the First Nation's submissions on the significance of its hunting and fishing rights and accept that the treaty was intended to protect a livelihood that had sustained the First Nation since time immemorial. The First Nation's traditional practices and reliance on the fishery were protected by the Treaty of 1779, and it is our view that it was entitled to compensation for the infringement upon its treaty rights and damages caused to its source of livelihood.

In 1970, the Band Council entered into an agreement that provided compensation for "damages and losses suffered by the Indians as a result of the erection of the dam and creation of the headpond by the Town of Dalhousie." This compensation was in recognition of the fact that "construction of the dam and reservoir diminished the quantities of fish, shellfish, waterfowl, and other natural resources which were traditionally available to the Indians." There is no basis in law for the Commission to conclude that the First Nation's treaty rights were inviolate and, in any event, it is always open to a First Nation to negotiate a settlement to compensate it for a breach or infringement of treaty fishing rights. Although the First Nation did not receive any compensation for the infringement of its treaty rights until 1970, the agreement entered into with the New Brunswick Water Authority was intended to compensate it for the damages caused to its fishery.

Therefore, we conclude that there is no outstanding lawful obligation owed by Canada to the First Nation on the basis of a breach of treaty. In view of these findings, it is not necessary for the Commission to determine whether the First Nation had any riparian rights in addition to its treaty rights to fish in the waters adjacent to the reserve.

Issue 2 Authority for Permit and Expropriation of Eel River Reserve Land

Section 28(2) and the 1970 Letter-Permit

In light of a recent decision of the Supreme Court of Canada, we find that the 1970 letter-permit granting the use and occupation of 4.71 acres of reserve land for the purposes of a pumping station, pipeline right of way, and access road was properly issued by the Minister of Indian Affairs under the authority of section 28(2) of the *Indian Act*. The permit was for an indefinite but clearly ascertainable and justiciable period of time. The interest in land granted was not of such a nature that it required the consent of the entire Band membership in accordance with the surrender provisions of the Act.

Section 35 Expropriation of the Headpond

With respect to the expropriation of 61.57 acres of reserve land for the headpond in 1970, the wording of the Order in Council and the surrounding circumstances support a finding that the Governor in Council authorized the transfer of administration of reserve land to the Province of New Brunswick under section 35(3) in lieu of the province having to take the lands without the consent of the Band pursuant to the procedures of the New Brunswick *Expropriation Act*. The province was "empowered" to expropriate the land in question because it fell within the definition of a "public work," and the dominant purpose of the work was to promote economic activity and job creation in the general public interest. Since this was a taking pursuant to section 35(3), it was not necessary for the federal or the provincial Crown to comply with the procedures for a compulsory taking as set out in the *Expropriation Act*.

We do not accept the assertion that, because the Band consented to the expropriation, neither the provincial nor the federal Crown could exercise their expropriation powers. Section 35(3) of the *Indian Act* conferred on the Governor in Council a broad discretion to consent to the transfer of reserve land to the province in lieu of the land being taken without the Band's consent subject to the terms contained in the 1970 agreement. Because the Band consented to the expropriation of reserve land subject to the payment of compensation agreed to between the Band and the NBWA, the transfer of land was authorized by the Governor in Council under section 35(3) rather than section 35(1), and there was no need to trigger the procedural requirements of the *Expropriation Act*. Furthermore, even though the Band Council consented to the use of expropriation powers under section 35 and agreed to a negotiated settlement on compensation for the land taken, this does not alter the fact that this was essentially a compulsory taking of land. There was always the possibility that the Governor in Council might consent to the expropriation under section 35(1) if the Band did not reach an agreement with the town or the NBWA. The reality of the situation was that the negotiations proceeded in the shadow of a possible expropriation of the land if the Band did not consent to the construction of the dam. Finally, compliance with the surrender provisions of the *Indian Act* is not required when reserve lands are expropriated under section 35, because the surrender provision under section 37 must be read in conjunction with and subject to other provisions of the *Indian Act*.

Trespass and Delay from 1963 to 1970

In 1963, the Town of Dalhousie built the dam on the Eel River reserve and flooded additional lands without any specific authority to do so until 1970, when the headpond was expropriated and a letter-permit was granted to the NBWA for the pumping station, pipeline right of way, and access road to maintain the Eel River water supply system. No compensation was paid for the use and occupation of the reserve land until 1970.

In our view, the sections of the *Indian Act* governing the use and occupation of reserve land or its disposition to non-Indians must be interpreted in such a way as to balance a band's autonomy against the Crown's supervisory and protective role. According to recent decisions of the Supreme Court of Canada, the purpose of the requirement of the Crown's approval in the case of a surrender under section 37 or a section 28(2) permit is to ensure that all transactions involving reserve land are approved by the band *and* the Minister or the Governor in Council, as the case may be, to prevent the band from being exploited. If use and occupation of reserve lands through means other than those specified in the *Indian Act*, including uses allowed solely by the band, were sanctioned, the Crown would be released from its protective responsibility contrary to the intent of the *Indian Act* and the policy that underlies it. Accordingly, unless the use and occupation has been authorized by the Crown in one of the forms contemplated by the Act – surrender, expropriation, or permit – the use and occupation of reserve land is contrary to the Act.

Therefore, the consent or agreement of the Eel River Band, as expressed in the 1963 Band Council Resolution, is void because no permit was issued by the Minister under section 28(2) as required. This state of affairs remained the same until September 1968, when the Minister of Indian Affairs issued a one-year permit allowing the NBWA access to the land to carry out certain works in relation to the dam and water supply system. At this point, the NBWA had the proper authority to use and occupy the land for these purposes. The reserve lands flooded by the headpond, however, continued to be in a state of trespass until they were expropriated in 1970.

We find, therefore, that there was a trespass on reserve land from 1963 to 1970, the extent of which was narrowed by the 1968 permit. We are, however, unable to conclude that any outstanding lawful obligation necessarily flows from this trespass because the 1970 agreement was intended to compensate the Eel River Band for its losses and damages arising from the construction of the dam. Whether the Crown fulfilled its fiduciary duties to the Eel River Band during the negotiations leading up to the 1970 agreement, and whether the Band received fair and equitable compensation for its losses, are separate questions.

Issue 3 Fiduciary Obligations of the Crown

Recent decisions of the Supreme Court of Canada state that regard must be had to the twin principles of autonomy and protection when dealing with the disposition of Indian interests in reserve land. Although the Crown has a statutory and fiduciary duty to protect Indian bands from the unlawful alienation and disposition of reserve land, the relative autonomy of the band to make decisions with respect to its land and resources must also be promoted and respected. Depending on the nature of the rights granted, different levels of autonomy and protection will apply between the Crown and the band involved in the proposed transaction.

On the facts of this case, we conclude that Canada properly discharged its fiduciary obligations to the Eel River Band for the following reasons. First, the Band Council was well aware of the nature of the dealings surrounding the dam and the implications of the transaction. When the town first proposed to construct the dam near the mouth of the Eel River, the Band opposed the selection of that site on the grounds that this location would damage the clam beds and reduce the income of Band members who relied on the clam harvest to make a living. When a site further upstream was selected, however, the Band Council indicated that it would agree to the construction of the dam if the town and local industries provided employment opportunities for its members to replace the lost income that would result from the reduction in clam harvests. There is ample evidence that, for whatever reason, whether it was a lack of effort, systemic discrimination, or conditions totally beyond the control of the parties to the contract, employment for Band members was never obtained in any meaningful way, despite the commitments made by the Town of Dalhousie in 1963. Nevertheless, protracted negotiations between the Band, Canada, and the NBWA culminated in the 1970 agreement, which provided for payment of a substantial amount of compensation to the Band. In lieu of employment opportunities, it is significant that the Band obtained a commitment from the NBWA that it would pay an annual fee for water pumped and that the agreement would be subject to renegotiation after 20 years.

Second, there is no evidence that Indian Affairs officials tainted the dealings in such a manner that it would be unsafe to rely on the Band's understanding and intention. The dealings in this case were initiated not by the Band or by Canada, but by the Province of New Brunswick and by the Town of Dalhousie. From the time that construction of the dam was first proposed in 1962 until the negotiations culminated in the signing of the 1970 agreement, Indian Affairs officials acted consistently and persistently to protect the Band's interests. Throughout these protracted negotiations, Indian Affairs officials acted as articulate and forceful advocates on behalf of the Band. Since there is no evidence of an actual conflict of interest between Canada and the Band on the facts before us, Canada was under no obligation to provide independent legal advice to the Band to ensure that the latter's interests were properly represented. Canada's obligation was to advise and inform the Band of the nature and foreseeable consequences of the transaction. To fulfil this obligation, Indian Affairs sought and obtained legal and technical advice on behalf of the Band and acted in a responsible and prudent manner throughout the negotiations. Moreover, the Band was aware that it could seek independent legal advice, but chose not to for reasons that are not entirely clear from the record.

Third, there is no evidence that the Band effectively abnegated or ceded its power to make decisions with respect to the dam project and the compensation offered by the town and the NBWA. Although Indian Affairs was involved in various aspects of the negotiations and did retain independent technical assistance to determine the effect of the dam on the clam harvest and the extent of the Band's losses, the evidence demonstrates that the Band's representatives were capable and persistent advocates of its own rights and interests. Since the Band made its own decisions, albeit with the assistance of the Indian Affairs Branch and others, the Commission must uphold the guiding principle that the autonomous decisions of the Band are to be honoured and respected.

Fourth, there is no evidence that the 1970 agreement represented a foolish, improvident, or exploitative transaction which should not have been approved by the Minister of Indian Affairs and the Governor in Council. The compensation negotiations never contemplated a straight cash settlement, but instead consisted of various proposals of land exchange, employment, development opportunities, cash, and reversionary interests in land. In arriving at a final settlement in 1970, the parties relied to a large extent on the expert advice of Dr Medcof, who was solely motivated to provide a report that fairly and fully recognized the Band's losses. Using Dr Medcof's surveys as a measure of the adequacy of compensation provided for in the 1970 agreement, the Commission concludes that the agreement was not exploitative. Given the town's unwillingness to provide employment to members of the Band, it was not unreasonable for the Band and Canada to focus their efforts on other forms of compensation, such as the pumping fee, as an alternative means of compensating the Band for its losses. Finally, in the days just before the deal was closed, even though the Band sought immediately to sign the agreement, Indian Affairs slowed the process down and indicated that it would not approve the final deal until concerns it had over certain aspects of the draft agreement had been resolved.

In conclusion, we have found that the Band fully understood the nature and consequences of the establishment of the dam and the provisions of the 1970 agreement, and that there was no evidence of any tainted dealings on the part of Canada's officials during the negotiations. We have also found that there was no aspect of the relationship between Canada and the Band to support the argument that the Band ceded or abnegated its power to decide at any stage of the negotiations. Finally, we have concluded that the settlement reached in the 1970 agreement cannot be characterized as foolish, improvident, or exploitative such that the Minister of Indian Affairs and the Governor in Council should not have approved the transaction and authorized the section 28(2) permit and the expropriation of the headpond under section 35. Accordingly, we find that the Crown discharged its fiduciary obligations to the Eel River Bar First Nation.

Having said that, there is no question in our minds that the negotiations surrounding the dam were very difficult. The protracted nature of these negotiations resulted in great hardship for many members of the First Nation who relied on the clams for food and as a means of supplementing their incomes. In 1963, the Band agreed to allow construction of the dam to proceed in good faith on the assumption that the town and the NBWA would fulfil their respective obligations, particularly with regard to employment for members of the Band. Although the dam did have an adverse effect on the clams, as anticipated by the Band, the town and the NBWA did not fulfil their promises and no compensation was paid to the Band for its losses or the use of its lands until 1970. These hardships, however, were not the result of any dereliction of duty on the part of the Indian Affairs Branch or its agents. We find that, throughout the course of negotiations, the IAB and its agents conducted themselves properly, acted as articulate and forceful spokespersons on behalf of the Band, and did not allow themselves to be compromised in any way.

RECOMMENDATION

Based on a thorough consideration of the facts and law in relation to this claim, we find that the evidence before us does not support a finding that Canada owes an outstanding lawful obligation to the Eel River Bar First Nation. Accordingly, we recommend:

That the Eel River Bar First Nation's claim not be accepted for negotiation under Canada's Specific Claims Policy.

FOR THE INDIAN CLAIMS COMMISSION

Daniel J. Bellegarde Commission Co-Chair	Roger J. Augustine Commissioner	Aurélien Gill Commissioner

Dated this 18th day of December, 1997

APPENDIX A

EEL RIVER BAR FIRST NATION INQUIRY

1 **Request that Commission conduct inquiry** September 19, 1995

2 **Planning conferences** (2) December 14, 1995, and February 27, 1996

3 **Community sessions** (2) April 23, 1996, and July 11, 1996

Two community sessions were held. At the first, held on April 23, 1996, the Commission heard from Chief Everett Martin, Elders Margaret LaBillois, Marion LaBillois, Richard Simonson, Hubert LaBillois, Peter Simonson, Earl LaBillois, Mary McBain, Afred Narvie, Leonard LaBillois, Gordon LaBillois, Rebecca LaBillois, and Howard LaBillois. The second session was held on July 11, 1996, at which time the Commission heard from Wallace LaBillois.

4 **Oral Session** February 20, 1997

5 **Content of the formal record**

The formal record for the Eel River Bar First Nation Inquiry into the Eel River Dam Claim consists of the following materials:

- 23 exhibits tendered during the inquiry, including the documentary record (3 volumes of documents with annotated index)
- written submissions from counsel for the Eel River Bar First Nation and counsel for Canada
- transcripts from community sessions and oral submissions (3 volumes)

The Report of the Commission and letters of transmittal to the parties will complete the formal record of this Inquiry.

APPENDIX B

TREATY ENTERED INTO WITH – THE INDIANS OF NOVA SCOTIA FROM CAPE TORMENTINE TO THE BAY DE CHALEURS, 22 SEPT. 1779

Whereas in May and July last a number of Indians at the Instigation of the Kings disaffected Subjects did Plunder and Rob Wm. John Cort and several other of the English Inhabitants at Mirimichy of the principal parat of their Effects in Which transaction, we the undersigned Indians had no conscience, but nevertheless do blame ourselves, for not having exerted our Abilitys more Effectually than We did to prevent it, being now greatly distressed and at a loss for the necessary supplys to keep us from the Inclemancy of the approaching Winter and to Enable us to Subsist our familys. And Whereas Captaine Augustus Gervey commander of His Majesty's Sloop Viper did in July last (to prevent further mischief) seize upon the Mirimichy River, Sixteen of the said Indians one of which was killed, Three released and Twelve of the most Atrocious have been carried to Quebec, to be dealt with, as His Majesty's Government of this Province, shall in future Direct, which measures We hope will tend to restore Peace and good order in that Neighbourhood.

Be it Known to all Men That we John Julien, Chief; Antoine Arueau Captain, Francis Julien and Thomas Dewagonisde Councillors of Mirimichy, and also Representatives of, and Authorized by, the Indians of Pagumske and Restigousche, Michael Chief, Louis Augustine Cobaise, Francis Joseph Aruiph, Captains, Antoines and Guiassance Gabalier Councillors of Richebouctou, and Thomas Tauros Lose and Representatives of the Chief of Jedyac, do for ourselves and in behalf on the several Tribes of Mickmack Indians before mentioned and all others residing between Cape Tormentine and the Bay De Chaleurs in the Gulph of St. Lawrence inclusive, Solemnly Promise and engage to and with – Michael Francklin Esq. The Kings Superintendant of Indian Affairs in Nova Scotia.

That we will behave Quietly and Peaceably towards all his Majesty King George's good Subjects treating these upon every occasion in an honest friendly and Brotherly manner.

That we will at the Hazard of our Lives defend and Protect to the utmost of our power, the Traders and Inhabitants and their merchandize and Effects who are or may be settled on the Rivers Bays and Sea Coasts within the forementioned District against all the Enemys of His Majesty King George Whether French, Rebells or Indians.

That We will wherever it shall be required apprehend and deliver into the Hands of the said Mr. V. Francklin, to be dealt with according to his Deserts, any Indian or other person who shall attempt to Disturb the Peace and Tranquility of the said District.

That we will not hold any correspondence or Intercourse with John Allan, or any other Rebell or Enemy to King George, let his nation or Country be what it will.

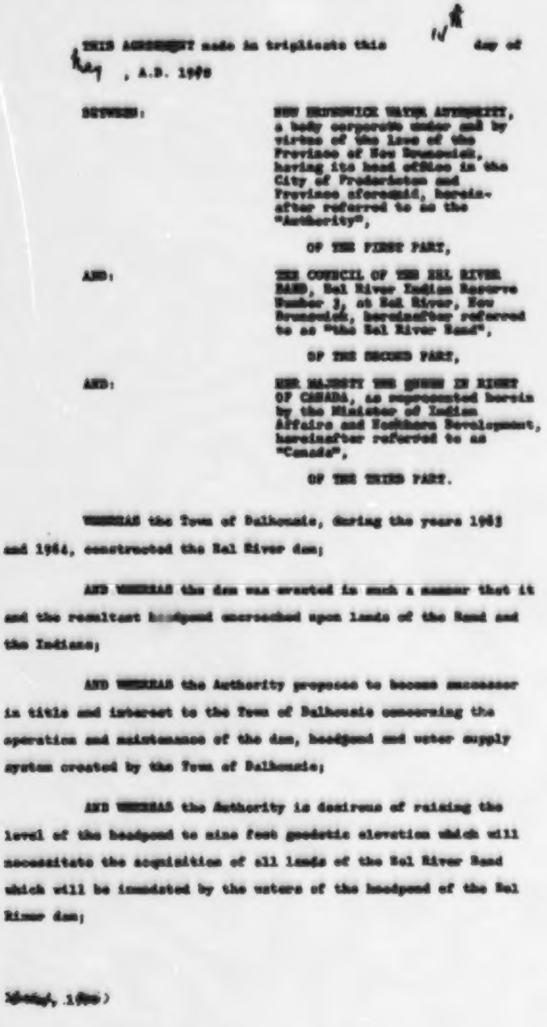
That we will use our best Endeavours to prevail with all other our Mickmack Brethern throughout the other parts of the Province, to come into the like measures with us for their several Districts.

And We do also by these presents for ourselves, and in behalf of our Several Constituents hereby review, Ratify and Confirm all former Treatys, entered into by us, or any of us or these heretofore with the late Governor Lawrence, and other His Majesty King Georges Governors who have succeeded him in the command of this province.

In consideration of the true performance of the foregoing Articles, on the part of the Indians Affairs doth hereby Promise in behalf of government:

> That the said Indians and their Constituents shall remain in the Districts before mentioned Quiet and Free from any molestation of any of His Majesty's Troops or other his good Subjects in their Hunting and Fishing.
>
> That immediate measures shall be taken to cause Traders to supply them with Ammunition, clothing and other necessary stores in exchange for their Furrs and other commoditys. In Witness whereof we the above mentioned have interchangeably set our hands and Seals at Windsor in Nova Scotia this Twenty second day of September 1779.

APPENDIX C



THIS AGREEMENT made in triplicate this 14th day of May, A.D. 1970

BETWEEN: NEW BRUNSWICK WATER AUTHORITY, a body corporate under and by virtue of the laws of the Province of New Brunswick, having its head office in the City of Fredericton and Province aforesaid, hereinafter referred to as the "Authority",

OF THE FIRST PART,

AND: THE COUNCIL OF THE EEL RIVER BAND, Eel River Indian Reserve Number 3, at Eel River, New Brunswick, hereinafter referred to as "the Eel River Band",

OF THE SECOND PART,

AND: HER MAJESTY THE QUEEN IN RIGHT OF CANADA, as represented herein by the Minister of Indian Affairs and Northern Development, hereinafter referred to as "Canada",

OF THE THIRD PART.

WHEREAS the Town of Dalhousie, during the years 1963 and 1964, constructed the Eel River dam;

AND WHEREAS the dam was erected in such a manner that it and the resultant headpond encroached upon lands of the Band and the Indians;

AND WHEREAS the Authority proposes to become successor in title and interest to the Town of Dalhousie concerning the operation and maintenance of the dam, headpond and water supply system created by the Town of Dalhousie;

AND WHEREAS the Authority is desirous of raising the level of the headpond to nine feet geodetic elevation which will necessitate the acquisition of all lands of the Eel River Band which will be inundated by the waters of the headpond of the Eel River dam;

[illegible]

AND WHEREAS the Authority wishes to compensate the Eel River Band for damages and losses suffered by the Indians as a result of the erection of the dam and creation of the headpond by the Town of Dalhousie and to further compensate the Eel River Band and Indians for losses and damages that may be suffered as a result of the raising of the water level to nine foot geodetic elevation;

AND WHEREAS the Authority recognises that the construction of the dam and the reservoir has diminished the quantities of fish, shellfish, waterfowl, and other natural resources which were traditionally available to the Indians;

AND WHEREAS the Authority wishes to acquire from Canada and the Eel River Band all that land which will be flooded to a level of nine foot geodetic elevation by the headpond of the Eel River dam and access over the land occupied by the road leading to the said dam;

AND WHEREAS the Authority also wishes to acquire an easement in a strip of land adjacent to the existing New Brunswick International Paper Company pipeline right-of-way for the purpose of establishing thereon a pipeline and pumphouse;

AND WHEREAS the Eel River Band and Canada have agreed to take the necessary steps to transfer the administration and control of the lands to be subject to flooding and the grant of an easement to the Water Authority.

NOW THEREFORE for and in consideration of the mutual covenants and agreements herein contained the parties hereto covenant and agree as follows:

1. Canada will obtain the necessary approval of the Eel River Band to allow Canada to transfer as expeditiously as possible the administration and control of those lands as shown outlined

- 3 -

in red on Plan A hereto attached to Her Majesty the Queen in right of the Province of New Brunswick as represented by the Minister of Natural Resources.

2. Canada shall make all necessary arrangements to make as expeditiously as possible a grant of easement to the Authority over those lands shown outlined in orange on Plan A hereto attached for the purpose of constructing, maintaining and operating an access road, a water pipeline, and a pumping station.

3. In consideration of the transfer of the administration and control of the lands mentioned in section 1 and the grant of easement mentioned in section 2 the Authority shall make the following payments to Canada on behalf of the Eel River Band of Indians:

(a) the sum of $15,000.00 upon the signing of this agreement;

(b) an annual sum to be determined by reference to the volume of water pumped out of the Eel River dam headpond by the Authority in accordance with the formula established under section 4.

4. It is understood and agreed that the annual payment to be made by the Authority to the Eel River Band in accordance with clause (b) of section 3 is as follows:

(a) one-half cent per 1,000 U.S. gallons pumped from the Eel River headpond and the Eel River by the Authority;

(b) the annual sum calculated in accordance with clause (a) shall be payable on a quarterly basis based on a year which begins with the first day of April and ends with the thirty-first day of March the subsequent year; and

(c) if the amount payable to the Council in any one year is less than $10,000.00 then the Authority shall pay to the Council the amount calculated in accordance with clause (a) and the difference between that amount and

$10,000.00 so that the minimum payment in any one year shall be $10,000.00 except when the volume of water pumped by the Authority out of the Eel River dam headpond and the Eel River falls below 1,825,000,000 U.S. gallons per year in which case the Authority shall pay to the Council only that amount calculated as payable in accordance with clause (a).

5. It is covenanted and agreed by and between the parties hereto that the amount payable by the Authority in accordance with section 3 and calculated in accordance with section 4 shall be payable at the rate so established for a period of twenty years upon the expiration of which the method of calculating the payment and rate shall be subject to review and negotiation by the parties and shall be subject to review and negotiation every five years thereafter.

6. (1) The parties hereto covenant and agree that where they cannot agree upon new rates in accordance with section 5, any party hereto shall be entitled to give to the other parties notice of such dispute and to request arbitration thereof; and the parties may, with respect to the particular matters then in dispute, agree to submit the same to arbitration in accordance with subsection (2) and the Arbitration Act of New Brunswick.

(2) Upon notice to arbitrate being given under subsection (1) the Eel River Band and the Authority shall name one representative each to act as arbiters and those two arbiters shall jointly select a third person to act as Chairman of the arbitration board.

7. (1) It is understood and agreed by and between the parties hereto that the amount payable under section 3 and calculated in accordance with section 4 shall subject to subsection (2) be based on the gallonage pumped by the Authority from the Eel River headpond

or the Eel River, regardless of the location of the Authority's pumps, from all pumps maintained by the Authority on Eel River headpond and the Eel River but calculation of gallonage for payment purposes shall not begin until the Authority begins normal pumping operations.

(2) Where, during any period beginning with the first day of April and ending with the 31st day of March the subsequent year, the Authority pumps more than (15,000,000 U.S. gallons x 365 days) 5,475,000,000 U.S. gallons, the gallonage in excess thereof shall not be included in the calculation of the amount to be paid to the Eel River Band under sections 3 and 4.

8. The Authority shall pay to the Eel River Band the sum of $15,000.00 in consideration of and compensation for the conveyances to be made under sections 1 and 2 and to cover the cost of all damage, injury and loss to person and property of the Council which may heretofore or hereafter be sustained in consequence of the erection and operation of the Eel River dam, Eel River water supply system and the Eel River headpond and subject to section 11 the repair and maintenance of same.

9. The Authority insofar as it has the authority to do so, shall allow the Eel River Band to erect and maintain a commercial marina on that portion of the Eel River headpond abutting the lands of the Eel River Band and shall allow members of the Eel River Band access to the headpond across the lands to be vested in the Crown in right of the Province provided the Eel River Band compensates the Authority for any damages which may be caused to property of the Authority arising out of the use of such access.

10. The Eel River Band shall have a first option to purchase the land shown outlined in red on plan A hereto attached if at any time after the transfer of the administration and control of the said lands to the Authority those lands cease to be used for the purposes of a water supply system.

11. (1) The parties hereto covenant and agree that the Authority, its agents, servants, workmen, and contractors shall have a right of access for the purposes of crossing and recrossing

the lands of the Eel River Band for the purposes of inspecting, constructing, maintaining, and repairing the Eel River headpond, dam and water supply system.

(2) The Authority undertakes to pay reasonable compensation for damages to the property or growing crops of the Eel River Band which result from the exercise of the right set forth in subsection (1).

IN WITNESS WHEREOF the party of the first part has caused these presents to be executed and its seal affixed by its proper officers and the party of the second part has executed these presents by its proper officers and the party of the third part has executed these presents by its proper officer on the day and year first above written.

SIGNED, SEALED AND DELIVERED
in the presence of:

for J. M. Marion

NEW BRUNSWICK WATER AUTHORITY

Chairman

Secretary

COUNCIL OF THE EEL RIVER BAND

Chief Councillor

Mrs Wallace LaBillois

Howard LaBillois
Councillor

HER MAJESTY THE QUEEN IN RIGHT
OF CANADA

for Minister of Indian Affairs and
Northern Development

APPENDIX D

RELEVANT PROVISIONS OF *INDIAN ACT*, RSC 1952, C. 149

18.(1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart; and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

. . .

28.(1) Subject to subsection (2), any deed, lease, contract, instrument, document or agreement of any kind, whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.

(2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

. . .

35.(1) Where by an Act of the Parliament of Canada or a provincial legislature Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in a reserve or any interest therein.

(2) Unless the Governor in Council otherwise directs, all matters relating to compulsory taking or using of lands in a reserve under subsection (1) shall be governed by the statute by which the powers are conferred.

(3) Whenever the Governor in Council has consented to the exercise by a province, authority or corporation of the powers referred to in subsection (1), the Governor in Council may, in lieu of the province, authority or corporation taking or using the lands without consent of the owner, authorize a transfer or grant of such lands to

the province, authority or corporation, subject to any terms that may be prescribed by the Governor in Council.

(4) Any amount that is agreed upon or awarded in respect of the compulsory taking or using of land under this section or that is paid for a transfer or grant of land pursuant to this section shall be paid to the Receiver General of Canada for the use and benefit of the Band or for the use and benefit of any Indian who is entitled to compensation or payment as a result of the exercise of the powers referred to in subsection (1).

. . .

37. Except where this Act otherwise provides, lands in a reserve shall not be sold, alienated, leased or otherwise disposed of until they have been surrendered to Her Majesty by the band for whose use and benefit in common the reserve was set apart.

38.(1) A band may surrender to Her Majesty any right or interest of the band and its members in a reserve.

(2) A surrender may be absolute or qualified, conditional or unconditional.

39.(1) A surrender is void unless
- (a) it is made to Her Majesty,
- (b) it is assented to by a majority of the electors of the band at
  - (i) a general meeting of the band called by the council of the band, or
  - (ii) a special meeting of the band called by the Minister for the purpose of considering a proposed surrender, and
- (c) it is accepted by the Governor in Council.

(2) Where a majority of the electors of a band did not vote at a meeting called pursuant to subsection (1) of this section or pursuant to section 51 of the *Indian Act*, chapter 98 of the Revised Statutes of Canada, 1927, the Minister may, if the proposed surrender was assented to by a majority of the electors who did vote, call another meeting by giving thirty days' notice thereof.

(3) Where a meeting is called pursuant to subsection (2) and the proposed surrender is assented to at the meeting by a majority of the members voting, the surrender shall be deemed, for the purpose of this section, to have been assented to by a majority of the electors of the band.

(4) The Minister may, at the request of the council of the band or whenever he considers it advisable, order that a vote at any meeting under this section shall be by secret ballot.

(5) Every meeting under this section shall be held in the presence of the superintendent or some other officer of the Department designated by the Minister.

40. When a proposed surrender has been assented to by the band in accordance with section 39, it shall be certified on oath by the superintendent or other officer who attended the meeting and by the chief or a member of the council of the band, and shall be submitted to the Governor in Council for acceptance or refusal.

41. A surrender shall be deemed to confer all rights that are necessary to enable Her Majesty to carry out the terms of the surrender.

INDIAN CLAIMS COMMISSION

QU'APPELLE VALLEY INDIAN DEVELOPMENT AUTHORITY INQUIRY

FLOODING CLAIM

Muscowpetung First Nation	Sakimay First Nation
Pasqua First Nation	Cowessess First Nation
Standing Buffalo First Nation	Ochapowace First Nation

PANEL

Commission Co-Chair P.E. James Prentice, QC
Commissioner Carole T. Corcoran
Commissioner Roger J. Augustine

COUNSEL

For the Qu'Appelle Valley Indian Development Authority
David Knoll

For the Government of Canada
Bruce Becker

To the Indian Claims Commission
Ron S. Maurice / Kathleen Lickers / Thomas A. Gould

FEBRUARY 1998

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EXECUTIVE SUMMARY

HISTORICAL BACKGROUND TO THE CLAIM

THE QU'APPELLE VALLEY INDIAN DEVELOPMENT AUTHORITY

The Qu'Appelle Valley Indian Development Authority (QVIDA) is made up of eight member First Nations, six of which are participating in the present proceedings. The four western bands are the Piapot, Muscowpetung, Pasqua, and Standing Buffalo First Nations, and the four eastern bands are the Sakimay, Cowessess, Kahkewistahaw, and Ochapowace First Nations. Piapot and Kahkewistahaw are not involved in this inquiry.

THE IMPORTANCE OF WATER IN THE QU'APPELLE VALLEY

There are six lakes in the Qu'Appelle Valley in the vicinity of the reserve lands at present held by the six participating First Nations. Four lakes located in close proximity to the western First Nations are known as the Fishing Lakes, including Pasqua Lake (also known as Qu'Appelle Lake), Echo Lake, Mission Lake (also known as Lebret Lake), and Katepwe Lake. The remaining two lakes are Crooked and Round Lakes, on which the three participating eastern First Nations are located.

Treaty 4, or the Qu'Appelle Treaty, was entered into on September 15, 1874, by representatives of the Government of Canada and by the Chiefs of four of the QVIDA First Nations: Cowessess ("Ka-wey-ance" or "Ka-wezauce," also known as "The Little Boy" or "The Little Child"), Pasqua ("The Plain"), Kahkewistahaw ("Him That Flies Around"), and finally Kakisheway ("Loud Voice") and Chacachas (whose bands later merged to become Ochapowace). In the years following settlement on their respective reserves, the QVIDA First Nations developed economies that took advantage of the abundant natural resources available in the Qu'Appelle Valley. The relatively flat landscape resulted in seasonal flooding of hay flats and ongoing "natural irrigation," which stimulated high yields of top-quality hay. Other products of the valley included cattle (fed on hay), firewood, farm produce, senega root, berries, small game, and all of the First Nations took advantage of the fishing in the various lakes. The Indians also supplemented their livelihoods by freighting, hauling hay, tanning and managing cattle for the agency farm, trading, and working off the reserves.

In 1894, the federal government passed the *North-West Irrigation Act*, which was designed to vest property rights in water to the Crown throughout the North-West Territories. The Act provided that any person who already held water rights similar to those recognized under this Act, or who had constructed or was operating dams and other works, could obtain a licence or authorization within a certain period of time to continue to be able to exercise those rights. Failure to obtain a licence resulted in the water rights being forfeited to the Crown. There is no evidence that any application was made by Indian Affairs on behalf of the Qu'Appelle Valley Bands for such a licence or authorization.

During the 1930s, water in the Qu'Appelle Valley took on even greater importance as a result of extended drought conditions on the prairies and a worldwide economic depression. These events prompted the federal government to create the Prairie Farm Rehabilitation Administration (PFRA), whose mandate was to provide for the rehabilitation of the drought and of soil-drifting areas of the three Prairie Provinces and to assist in the conservation of surface water supplies for household use, stockwatering, and irrigation. The Qu'Appelle Valley was just one possible area for large water development projects, and investigations began across the Prairie Provinces to assess the viability of many potential sites for the erection of water control structures. Comprehensive field investigations, including topographical surveys and soil investigations, were required to determine the foundations needed for the structures that would have to be built.

DEVELOPMENT OF DAMS IN THE QU'APPELLE VALLEY

Echo Lake Project

In May 1941, the PFRA asked Indian Affairs for permission to erect a dam at the east end of Pasqua Lake that would have the effect of continuously flooding portions of the Muscowpetung and Pasqua reserves. Indian Affairs responded that it was obvious that damage would result from this project and that investigations would be undertaken to quantify the compensation that would have to be paid to the affected bands. P.A. Fetterly, an engineer with the Department of Mines and Resources, estimated that the total damages payable to the Muscowpetung and Pasqua Bands would be $8050. No recognition was given to any potential flooding of lands on the Standing Buffalo reserve.

The proposed dam on Pasqua Lake was not built, but instead a structure on Echo Lake was substituted to control the water levels of both lakes. No adjustment or reconsideration of Fetterly's damage estimate was made since it was believed that, in the short term, less damage would be caused by a structure on Echo Lake and, in the long term, it was likely that a structure would also be constructed on Pasqua Lake. The dam was built shortly after approval of the project was obtained in 1942. However, Fetterly's estimate of $8050 to compensate the Muscowpetung and Pasqua Bands for damage to their reserve lands was never paid to the Bands, even though the PFRA and Indian Affairs considered the amount to be reasonable. There is no evidence that the Bands authorized the project or were even consulted regarding the dam.

Crooked Lake and Round Lake Project

In 1941, Fetterly was asked by the PFRA to provide his opinion regarding the potential damages and benefits that might arise from the construction of dams on Crooked and Round Lakes. In the meantime, the PFRA commenced construction on the two dams without obtaining consent from affected Bands. The PFRA apparently proceeded on the advice of the Acting Director of Indian Affairs who assumed that band consent was not necessary because the PFRA had powers of expropriation. In February 1942, Fetterly recommended that, in addition to paying damages of $3300 to the Sakimay, Cowessess, and Ochapowace Bands, the PFRA should also construct a bridge west of the flooded area on Crooked Lake to replace a ford that would be made impassable by the higher water levels. Approval of the payment of $3330, including an additional $30 in respect of the Cowessess Indian Residential School, was given in November 1942, and the payment was paid to the respective Bands in May 1943.

EFFECTS OF THE DAMS

The economies of the Qu'Appelle Valley First Nations before 1940 featured considerable reliance on activities and resources in the valley bottom, including native hay, timber, beaver, muskrat, deer, berries, maple sugar, and important cultural and medicinal herbs and vegetation, such as sweetgrass and senega root. The water in the river system itself was also fundamental to the Bands' existence, not only for domestic purposes but also for fishing, stockwatering, and the natural irrigation that it provided by means of seasonal flooding of low-lying lands. Lower water levels also permitted band members to cross the river to access hay and other resources on both sides. Several of the reserves "developed a strong attachment to economic, social and cultural activities based on the river habitat."

The construction of the dams resulted in the continuous flooding of certain areas of the reserves, with other areas occasionally flooded and still other areas damaged by capillary action and salinization. Various trees, shrubs, and nutrient rich grasses were replaced by saline plants, and the loss of shelter and food resulted in the reduction of small game. At the same time, the Indian economies were undermined by the shift away from large-scale use of horse-drawn wagons for transport and wood for heating fuel.

THE BAND COUNCIL RESOLUTIONS OF 1977

In late 1972, the PFRA determined that it had not compensated either Muscowpetung or Pasqua for damages caused by the Echo Lake dam and that there was no evidence of any agreement between the PFRA and Indian Affairs or the Bands. Negotiations commenced in September 1973, and by July 1975 all three participating western Bands had retained lawyer Roy Wellman to negotiate on their behalf. On November 16, 1976, the Bands offered to accept a lump sum settlement of $265,000 in consideration for a permit authorizing future use and occupation of reserve lands for flooding purposes as well as a release of past, present, and future damages caused by the structure.

The PFRA initially objected to this proposal, noting that the Bands had previously agreed to a settlement of $100 per acre based on the acreage determined by a joint engineering assessment. Eventually, however, the PFRA concluded that the sum of $265,000 could be justified, and the Bands passed Band Council Resolutions confirming the settlement. The settlement was approved on July 7, 1977, and payments were deposited to the credit of the respective Bands.

DISSATISFACTION WITH THE SETTLEMENT

In October 1977, the new Chief of the Muscowpetung First Nation, Ron Rosebluff, raised concerns about the "perpetual" nature of the settlement, which he later equated to a surrender. Although Muscowpetung initially intended not to use or even accept the funds allocated to it, the evidence indicates that all three First Nations spent all or virtually all of the sums paid to them. Despite assurances from the PFRA that the settlement did not represent a permanent alienation of land requiring a surrender and the consent of a majority of eligible band members, Muscowpetung issued a Band Council Resolution in February 1978 rescinding the 1977 Band Council Resolutions.

In addition to the objections of Chief Rosebluff, Indian Affairs was having difficulties identifying the lands to be covered by the permits contemplated by the 1977 settlement. A dispute regarding the permits developed between Indian Affairs and the Department of Regional Economic Expansion (DREE). Although the dispute was elevated to deputy ministerial level by late 1981 and early 1982, the departments reached an impasse and no permits were ever issued.

In the meantime, QVIDA had been formed in 1979 to represent the interests of its eight member First Nations. Standing Buffalo issued its own rescinding Band Council Resolution on November 10, 1980, and Pasqua followed suit on February 10, 1982. In mid-1986, the QVIDA Bands issued Band Council Resolutions approving the submission of specific claims for compensation arising from "the illegal alienation and flooding" of their respective reserves. However, owing to a lack of activity, QVIDA's claim file was closed in 1989 by the Specific Claims Branch of Indian Affairs subject to the understanding that it could be reopened when QVIDA was ready to resubmit its claim. QVIDA viewed this as a "constructive rejection" of the claim by Indian Affairs. Accordingly, in September 1994, the QVIDA First Nations requested that the Indian Claims Commission conduct an inquiry into the claim.

ISSUES

The broad question before the Indian Claims Commission in this inquiry is whether the claims of the six QVIDA First Nations disclose a breach of the Crown's "lawful obligations" to the First Nations under the Specific Claims Policy. In answering this question, the Commission must determine whether, based on the evidence and submissions, these claims were properly rejected by Canada.

Canada and the participating QVIDA First Nations have agreed that, to assess the claims properly, the Commission must consider the following five issues:

1 Could the Crown authorize the PFRA under section 34 of the *Indian Act*, 1927, to use and occupy reserve lands for flooding purposes? If so, was the PFRA so authorized? If not, did Canada breach its fiduciary obligations

to the QVIDA First Nations by failing to obtain proper authorization under the Act?

2 If Canada could and did properly authorize the PFRA under section 34 of the *Indian Act*, 1927, to use and occupy reserve lands for flooding purposes, did the Crown nevertheless have a fiduciary obligation to consult or otherwise consider the best interests of the QVIDA First Nations before proceeding?

3 Did the terms of Treaty 4 preclude the Crown from relying on section 34 of the *Indian Act*, 1927, or otherwise require the consent of the QVIDA First Nations to authorize the PFRA to use and occupy reserve lands for flooding purposes?

4 Did the Band Council Resolutions signed by the Pasqua, Standing Buffalo, and Muscowpetung First Nations in the 1970s effectively release the Crown and the PFRA from all past, present, and future claims for damage caused by the Echo Lake control structure built in the 1940s?

5 Did those QVIDA First Nations with reserves adjacent to or on both sides of the Qu'Appelle River and lakes have common law riparian water rights, including rights to the river beds? If so, did the Crown have an obligation to ensure that these water rights were protected under the *North-West Irrigation Act*, 1894, and the *Dominion Power Act*, and to act in the First Nations' best interests when those rights might be affected? Moreover, did the Crown act in the best interests of the QVIDA First Nations when it authorized the PFRA to construct control structures that altered the First Nations' riparian interests and caused consequential losses?

THE COMMISSION'S ANALYSIS AND FINDINGS

Issue 1: Section 34 of the *Indian Act*, 1927

Canada acknowledged that it had not acquired the right to use and occupy reserve lands of the QVIDA First Nations by way of expropriation or surrender, so the question that remained was whether such use and occupation could be authorized by the Superintendent General of Indian Affairs under section 34 of the 1927 *Indian Act*. Based on the reasoning of the Supreme Court of Canada's recent ruling in *Opetchesaht Indian Band v. Canada*, the Commission concludes that, even if section 34 enabled the Superintendent

General to authorize the use and occupation of reserve land, the rights conveyed to the PFRA were too extensive, exclusive, and permanent to be authorized under section 34. Moreover, unlike subsection 28(2) of the later *Indian Act*, section 34 does not contemplate consent by either a band or a band council, meaning that it should be interpreted even more narrowly than subsection 28(2).

Since section 34 did not form an appropriate basis for authorizing use and occupation of reserve lands for flooding purposes in this case, it was not necessary for the Commission to consider whether Canada actually did authorize the PFRA to use and occupy reserve lands under the section. It was necessary for the PFRA to acquire by surrender or expropriation the right to use and occupy reserve lands for flooding purposes. Having failed to do so, the PFRA has trespassed on the reserve lands of all six participating First Nations from the early 1940s to at least 1977, and on the reserve lands of the Sakimay, Cowessess, and Ochapowace First Nations to this day. The impact of the 1977 settlement on the PFRA's use and occupation of the reserve lands of the Muscowpetung, Pasqua, and Standing Buffalo First Nations is addressed below.

Issues 2 and 3: Canada's Fiduciary and Treaty Obligations

Given that the Commission has concluded that it was inappropriate for Canada to authorize the PFRA to use and occupy reserve lands for flooding purposes under section 34 of the 1927 *Indian Act*, it is unnecessary to determine whether Canada breached a fiduciary or treaty obligation to consult or otherwise consider the best interests of the QVIDA First Nations before proceeding.

Issue 4: Effects of the 1977 Band Council Resolutions

For the same reasons that it was not open to Canada to authorize the use and occupation of reserve lands for flooding purposes under section 34 of the 1927 *Indian Act*, Canada could not authorize such use and occupation under subsection 28(2) of the 1970 *Indian Act* as part of the 1977 settlement discussions with Muscowpetung, Pasqua, and Standing Buffalo. The present case is distinguishable from *Opetchesaht* and the Commission's inquiry into the Eel River Bar First Nation because of the more extensive, exclusive, and permanent interest granted to the PFRA than to the British Columbia Hydro and Power Authority and the New Brunswick Water Authority in those other cases. Moreover, the 1977 settlement was void from the beginning under subsection 28(1) of the *Indian Act*, either entirely or at a minimum with respect to that portion of the settlement relating to the permits and damages for future use and occupation looking forward from 1977. The effect of these conclusions is that the PFRA remained in trespass on the Muscowpetung, Pasqua, and Standing Buffalo reserves *after* 1977. The question of whether any pre-1977 trespasses were settled depends on whether the Band Councils had the power to enter into binding settlements with respect to the unauthorized use and occupation of reserve lands and whether the release clause in the 1977 Band Council Resolutions can be severed from those portions of the agreement rendered void by subsection 28(1) of the *Indian Act*.

Unless it chooses to remove the control structures at Echo Lake, Crooked Lake, and Round Lake, Canada should immediately commence negotiations to obtain, whether by surrender or expropriation, the interests in land it requires for flooding purposes from all six reserves. Canada should also commence negotiations to determine the remaining compensation, if any, payable to the Sakimay, Cowessess, and Ochapowace First Nations for flooding damages since the 1940s, taking into account the $3270 received by those First Nations as compensation in 1943. Similarly, Canada should commence negotiations to determine the remaining compensation, if any, payable to the Muscowpetung, Pasqua, and Standing Buffalo First Nations for flooding damages to those reserves, again taking into account the compensation of $265,000 paid to the three First Nations under the terms of the 1977 settlement. Whether the settlement entered into by the Band Councils in relation to damages prior to 1977 is binding on the respective Bands, and whether this part of the agreement can be severed and can operate independently to settle the damages arising during that period, are issues the parties should negotiate. If they are unable to settle those issues or any other question relating to the quantum of compensation arising out of the PFRA's use and occupation of reserve lands, the parties may return to the Commission for a further inquiry into such matters.

The Band Council Resolutions by which the three western Bands purported to rescind the 1977 Band Council Resolutions and the settlement are irrelevant to these proceedings. If the 1977 settlement was entirely void *ab initio* under subsection 28(1) of the *Indian Act*, this issue is academic since it would not have been necessary for the Bands to issue rescinding Band Council Resolutions to render the earlier resolutions ineffective. However, to the extent, if any, that the 1977 settlement can be considered valid under section 28 of the *Indian Act*, the 1977 Band Council Resolutions were merely evidence of the intention to enter into a contract. As such, it would be contrary to basic principles of contract law to permit the First Nations unilaterally to withdraw from the 1977 settlement without the concurrence of the PFRA.

Issue 5: Aboriginal, Treaty, and Riparian Water Rights
It is unnecessary for the Commission to address the nature and extent of the First Nations' aboriginal, treaty, and riparian water rights in light of our findings in relation to the first four issues. Nevertheless, to the extent that the interference with such water rights constitutes an alternative cause of action, and if the PFRA and its successors can be shown to have interfered with the First Nations' water rights, we consider the First Nations to be entitled to claim compensation for the damages caused by such interference. Due regard must be had, of course, for compensation already paid to the First Nations to avoid any element of "double counting."

The evidence before the Commission is insufficient to link pollution in the Qu'Appelle River conclusively to the construction and use of the Echo Lake, Crooked Lake, and Round Lake control structures. Similarly, we have been shown no evidence that the failure by Canada to license the First Nations' consumptive rights under the *North-West Irrigation Act* of 1894 has caused any damage to the First Nations. The Commission therefore declines the invitation to decide whether the First Nations' riparian or other water rights were extinguished by that statute, or whether the Crown failed to protect those rights.

RECOMMENDATIONS

Having found that the Government of Canada owes an outstanding lawful obligation to the First Nations of the Qu'Appelle Valley Indian Development Authority with respect to the Prairie Farm Rehabilitation Administration's acquisition of the right to use and occupy their reserve lands for flooding purposes, we therefore recommend:

1 **That Canada immediately commence negotiations with the QVIDA First Nations to acquire by surrender or expropriation such interests in land as may be required for the ongoing operation of the control structures at Echo Lake, Crooked Lake, and Round Lake or, alternatively, remove the control structures.**

2 That the flooding claims of the Sakimay, Cowessess, and Ochapowace First Nations be accepted for negotiation under Canada's Specific Claims Policy with respect to

(a) damages caused to reserve lands since the original construction of the dams in the early 1940s, and

(b) compensation for

  (i) the value of any interest that Canada may acquire in the reserve lands, and
  (ii) future damages to reserve lands,

subject to set-off of compensation of $3270 paid to those First Nations in 1943.

3 That the flooding claims of the Muscowpetung, Pasqua, and Standing Buffalo First Nations be accepted for negotiation under Canada's Specific Claims Policy with respect to

(a) damages caused to reserve lands

  (i) since the original construction of the dams in the early 1940s, or
  (ii) alternatively, since 1977, if these First Nations can be bound by the 1977 Band Council Resolutions and if the release for damages prior to 1977 can be severed from the invalid part of the settlement, and

(b) compensation for

  (i) the value of any interest that Canada may acquire in the reserve lands, and
  (ii) future damages to reserve lands,

subject to set-off of compensation of $265,000 paid to those First Nations in 1977.

PART I

INTRODUCTION

BACKGROUND TO THE CLAIM

To understand the claim of the Qu'Appelle Valley Indian Development Authority (QVIDA) in this inquiry, it is first necessary to understand the composition and purpose of the organization as well as the geography from which it derives its name.

QVIDA was established in 1979 in response to concerns of its member First Nations that, among other things, their culture, rights, and interests were not being sufficiently protected and articulated in the use and development of land and water resources in the Qu'Appelle Valley. Of particular relevance to this inquiry, the organization sought to obtain redress for damage caused to reserve lands by control structures erected by the Prairie Farm Rehabilitation Administration (PFRA) in the early 1940s, and to exert greater influence over the future operation of the water régime in the valley.

Eight First Nations constitute QVIDA's membership – from west to east, Piapot, Muscowpetung, Pasqua, Standing Buffalo, Sakimay, Cowessess, Kahkewistahaw, and Ochapowace – although only six are participants in the present inquiry. Since the inquiry relates strictly to damages caused by the PFRA's control structures at Echo Lake, Crooked Lake, and Round Lake, Piapot is not involved because it is located too far upstream to have been affected by those structures. It may initiate a separate claim in relation to damages alleged to have been caused by structures constructed on the river in the 1970s.

Similarly, Kahkewistahaw is not a participant in this inquiry because, in rejecting QVIDA's flooding claim, Canada did not understand that the flooding may have affected Kahkewistahaw's reserve lands and did not address the issue at that time. As a result, Canada has more recently undertaken to review further submissions from Kahkewistahaw with regard to damages, to determine what (if any) compensation was paid to the First Nation for the flooding of its reserve lands, and to provide a response. In the meantime, to allow the inquiry to proceed without further delay, Kahkewistahaw has elected to proceed separately should its claim be rejected by Canada after the First Nation has submitted additional claim materials.

At the centre of the QVIDA claims is the Qu'Appelle River (see map on page 186). At its west end, the river originates at Lake Diefenbaker, where the Gardiner and Qu'Appelle Dams have made a long, winding lake of the South Saskatchewan River reaching upstream almost to the boundary between Saskatchewan and Alberta. In dry years, water from the South Saskatchewan can be diverted around the Qu'Appelle Dam and down the valley to the thirsty farmlands below.

As the Qu'Appelle River meanders through the flat Saskatchewan landscape, its flow is first impeded by a control structure near Eyebrow, Saskatchewan, which creates tiny Eyebrow Lake. From there the river continues to the southeast until its current is again slowed by Buffalo Pound Lake, the product of another man-made control structure. Immediately below the dam, the river swings to the northeast, its volume augmented by the combined flows of the Moose Jaw River and Thunder Creek. Farther east it is joined just upstream of Lumsden by Wascana Creek, coming from Regina and supplemented by Cottonwood Creek. At Lumsden the Qu'Appelle River passes beneath Highway 11, the major roadway connecting Regina and Saskatoon, and extends northeast to Craven. There, the Craven and Valeport control structures permit water to be diverted northward into the huge storage capacity of Last Mountain Lake for later release to irrigate the Valeport Flats and other areas downstream.

Having passed Craven, the Qu'Appelle River maintains its northeast heading until it reaches Highway 6 directly north of Regina, where it veers to the east. At this point it enters the Piapot First Nation's Indian Reserve (IR) 75, which spans both sides of the river for several miles. Following a tortuous journey eastward, the river is joined from the north by Loon Creek, then traverses the northern edge of Muscowpetung's IR 80 and Pasqua's IR 79. Across the river from IR 80 is IR 80B, a hay reserve set apart for Muscowpetung and other bands, including Standing Buffalo. As the river flows along the northern boundary of the Pasqua reserve, it slows and empties into Pasqua Lake (at one time also known as Qu'Appelle Lake), the first of four lakes in quick succession which have come to be known collectively as the Fishing Lakes or the Qu'Appelle Lakes. Pasqua's reserve occupies almost the entire southern shore of Pasqua Lake, other than the most easterly mile or so.

Jumping Deer Creek drains from the north into the east end of Pasqua Lake about a half-mile upstream of the short channel between that lake and the second of the Fishing Lakes – Echo Lake. Standing Buffalo's IR 78 straddles Jumping Deer Creek along portions of the north shores of both Pasqua and Echo Lakes and the intervening reach of the river. Situated at the lower east end of Echo Lake, the Echo Lake Dam controls the water levels of both Pasqua Lake and Echo Lake. The structure floods valley lands on the Muscowpetung, Pasqua, and Standing Buffalo reserves, and it is this flooding that constitutes one aspect of the present claim before the Indian Claims Commission (the Commission).

Immediately below the dam are the town of Fort Qu'Appelle and the confluence of the Qu'Appelle River with the northward-flowing Echo Creek. As the river snakes to the southeast, it flows past the towns of Lebret and Katepwa and into Mission Lake and Katepwa Lake – the last two Fishing Lakes – before being restrained yet again by another control structure at the lower end of Katepwa Lake. From that point it continues to the southeast, supplementing its flow with drainage from Pheasant Creek to the north and Indianhead Creek, Redfox Creek, and Adair Creek to the south. Once again the river angles to the northeast, joining forces with Pearl Creek before resuming a southeasterly course and entering another Indian reserve just upstream of Crooked Lake. This land belongs to the Sakimay First Nation, including IR 74 on the south shore of the river and the western third of Crooked Lake, as well as Shesheep IR 74A on the opposite bank of the river and the western half of the lake.

Occupying the remaining south bank of Crooked Lake and some miles of the river downstream is Cowessess IR 73. Kahkewistahaw's IR 72A – a small fishing station – was initially positioned on the north shore near the Crooked Lake Dam at the lake's eastern outlet. The south end of the dam sits on land that originally formed part of the Cowessess reserve, although the First Nation and the PFRA disagree on the current status of title to the dam site. The dam is used to control the level of Crooked Lake and has resulted in certain portions of the Sakimay and Cowessess reserves being flooded. Immediately east of the dam, Ekapo Creek drains into the Qu'Appelle River from the south through IR 73.

As the river winds its way to the southeast, Kahkewistahaw's IR 72 occupies some five miles of the south shore of the river midway between Crooked and Round Lakes and adjacent to the eastern boundary of the Cowessess reserve. Kahkewistahaw's eastern neighbour is Ochapowace, whose IR 71 fronts the entire south shore of Round Lake and some distance both upstream and down. On the north side of the river and the east end of Round Lake are former Round Lake Indian Residential School lands which Kahkewistahaw purchased from the federal government in 1960 as an addition to IR 72. At Round Lake's eastern outlet, the eighth and last control structure was erected – its south end located on Ochapowace reserve lands – to store water in the lake for irrigation purposes. This dam caused flooding on the Ochapowace reserve at the west end of the lake. As noted at the outset, the full measure of the dam's impact on Kahkewistahaw's land remains to be determined and may form the subject matter of separate proceedings before the Commission.

The Qu'Appelle River finally meanders eastward to the Manitoba border, gaining additional flows from Squawhead Creek and Scissors Creek to the south and Kaposvar Creek and Cutarm Creek to the north. Ultimately, it reaches its confluence with the Assiniboine River just inside the Manitoba border at St Lazare, where it is swallowed up by the larger river before continuing eastward to its ultimate union with the Red River in central Winnipeg.

We have already alluded to the fact that the issues at the heart of this inquiry arise from the effects of the PFRA's construction and operation of dams on Echo Lake, Crooked Lake, and Round Lake on the reserves of the six QVIDA First Nations participating in these proceedings. The evidence is clear that the dams were constructed in the aftermath of severe drought conditions during the 1930s to store annual spring runoffs for later use in irrigating lands during periods of scant precipitation. It is just as clear that, although the PFRA and Indian Affairs were aware that the dams would flood Indian lands, the Bands themselves were not consulted and never authorized the projects to proceed. Three of the participating Bands – Muscowpetung, Pasqua, and Standing Buffalo – were not even paid the compensation to which the two government departments had agreed they were entitled. As a result, the first three issues in this inquiry consider whether section 34 of the *Indian Act* permitted Indian Affairs to authorize the flooding of reserve lands without Band consent; whether Indian Affairs did in fact authorize such flooding; and, if authorization *was* given, whether Indian Affairs was nevertheless required by treaty or as a fiduciary to consult with the Bands before allowing the PFRA to proceed.

In 1977, after Canada's failure to pay the Muscowpetung, Pasqua, and Standing Buffalo Bands had been discovered, the Band Councils of the day negotiated a settlement with the PFRA that would pay them the combined sum of $265,000 as compensation for past, present, and future damages caused by the dams. The Bands also agreed to allow permits to be issued pursuant to subsection 28(2) of the *Indian Act* that would allow the PFRA to continue flooding reserve lands. However, soon after Band Council Resolutions (BCRs) had been executed to authorize the settlement, and after the election of a new Muscowpetung Band Council, the three First Nations became concerned that they had permanently alienated reserve lands without obtaining surrenders approved by majorities of their respective voting memberships. All three First Nations purported to rescind the 1977 settlement Band Council Resolutions with later resolutions. These facts give rise to certain additional issues – namely, whether the settlement could be effected by way of Band Council Resolutions and permits issued under subsection 28(2), and whether it was open to the First Nations unilaterally to rescind the settlement, particularly since they had already received and have since spent the settlement proceeds of $265,000.

Finally, the Commission has been asked to consider the First Nations' water rights, whether arising as part of aboriginal title or as a result of treaty or riparian rights. The First Nations question whether their water rights were protected when the federal government laid claim to the beds and waters of non-navigable rivers by enacting the *North-West Irrigation Act* in 1894. If those rights *were* protected, the First Nations claim another basis for the damages caused by the construction and operation of the three dams without their consent. If the water rights were *not* protected, the First Nations claim that Canada breached fiduciary obligations to the First Nations in failing to protect those rights.

THE MANDATE OF THE INDIAN CLAIMS COMMISSION

The Commission's mandate to conduct inquiries pursuant to the *Inquiries Act* is set out in a commission issued on September 1, 1992. It directs:

> that our Commissioners on the basis of Canada's Specific Claims Policy . . . by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report on:
>
> (a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and

(b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination of the applicable criteria.[1]

The Specific Claims Policy is set forth in a 1982 booklet published by the Department of Indian Affairs and Northern Development entitled *Outstanding Business: A Native Claims Policy – Specific Claims*.[2] In considering a specific claim submitted by a First Nation to Canada, the Commission must assess whether Canada owes an outstanding lawful obligation to the First Nation in accordance with the guidelines provided in *Outstanding Business*:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
> ii) A breach of obligation arising out of the Indian Act or other statutes pertaining to Indians and the regulations thereunder.
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
> iv) An illegal disposition of Indian land.
>
> . . .
>
> In addition to the foregoing, the government is prepared to acknowledge claims which are based on the following circumstances:
>
> i) Failure to provide compensation for reserve lands taken or damaged by the federal government or its agencies under authority.
> ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.[3]

BACKGROUND TO THE INQUIRY

QVIDA submitted a claim to Indian Affairs in 1986 requesting compensation for the damages caused by the flooding of reserve lands.[4] On November 5,

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[1] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991 (Consolidated Terms of Reference).

[2] Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted in [1994] 1 ICCP 171-85.

[3] DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20.

[4] 116782 Canada Ltd., "Qu'Appelle Valley Indian Development Authority Land Claim," April 14, 1986 (ICC Exhibit 5).

1992, Carol Cosco of Indian Affairs advised Chief Lindsay Cyr, then President of QVIDA, that, owing to inactivity on QVIDA's claim since 1989, the Department intended to close the organization's file.[5] In that letter and follow-up correspondence on November 17, 1992, Cosco made it clear that the step was being taken primarily as a housekeeping measure and that the claim could be reopened from the point at which QVIDA had left off, without having to "start from scratch" or be delayed in handling.[6] Nevertheless, these letters were interpreted by the First Nations as a constructive rejection of their claim, and in October 1994, the claim was forwarded to the Indian Claims Commission with a request for an inquiry.[7]

On December 1, 1994, the Honourable Robert F. Reid, the Commission's Legal and Mediation Advisor, advised the parties that, having accepted QVIDA's request for an inquiry, the Commission sought to convene a planning conference.[8] Just over one week later, Rem Westland, the Director General of the Specific Claims Branch, expressed concern that the Commission would agree to conduct an inquiry in the QVIDA claim and in others that were "still in the research phase."[9] Nevertheless, counsel for Canada agreed to attend the first planning conference on January 30, 1995, and to discuss QVIDA's options in advancing its claim.

In fact, six planning conferences were conducted, and the parties were able to clarify and narrow the issues to be considered by the Commission. The first three conferences took place in Regina on January 30, June 6, and September 28, 1995. Before the fourth planning conference, which was held on April 3, 1996, Canada had completed its research into QVIDA's claims and provided its preliminary position in two "without prejudice" letters dated

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[5] Carol J. Cosco, Claims Analyst, Specific Claims West, Department of Indian and Northern Affairs, to Chief Lindsay Cyr, President, QVIDA, November 5, 1992, DIAND file BW8260/SK8552-C1, vol. 2 (ICC Documents, p. 1349).

[6] Carol J. Cosco, Claims Analyst, Specific Claims West, Department of Indian and Northern Affairs, to Chief Lindsay Cyr, President, QVIDA, November 17, 1992, DIAND file BW8260/SK8552-C1, vol. 2 (ICC Documents, p. 1350).

[7] Matthew Bellegarde, Claims and Policy Development Officer, Federation of Saskatchewan Indian Nations, to Kim Fullerton, Commission Counsel, Indian Claims Commission, October 11, 1994, enclosing Qu'Appelle Valley Indian Development Authority Record of Decision, September 12, 1994, with respect to a request by Chief Mel Isnana, Standing Buffalo, Chief Todd Peigan, Pasqua, Chief Eugene Anaquod, Muscowpetung, and Chief Joe Fourhorns, Piapot, to have the Indian Claims Commission carry out an inquiry into Canada's rejection of the QVIDA claim; Angela Delorme, Executive Secretary, Yorkton Tribal Council, to Kim Fullerton, Commission Counsel, Indian Claims Commission, October 26, 1994, enclosing Qu'Appelle Valley Indian Development Authority Record of Decision, September 12, 1994, with respect to a request by Chief Louis Taypotat, Kahkewistahaw, Chief Denton George, Ochapowace, Chief Terry Lavallee, Cowessess, and Chief Lindsay Kaye, Sakimay, to have the Indian Claims Commission carry out an inquiry into Canada's rejection of the QVIDA claim.

[8] Justice Robert F. Reid, Legal and Mediation Advisor, Indian Claims Commission, to Matthew Bellegarde, Claims and Policy Development Officer, Federation of Saskatchewan Indian Nations, and Bruce Becker, Legal Counsel, Specific Claims West, DIAND Legal Services, December 1, 1994.

[9] Rem Westland, Director General, Specific Claims Branch, Department of Indian and Northern Affairs, to Justice Robert Reid, Legal and Mediation Advisor, Indian Claims Commission, December 9, 1994.

March 29, 1996. In the first of these letters relating to the four western First Nations, Jack Hughes of Specific Claims West advised QVIDA Co-ordinator Gordon Lerat that Canada was prepared to recommend acceptance of the claim as it related to Standing Buffalo, but not with regard to Pasqua or Muscowpetung:

> **Muscowpetung and Pasqua Reserve Lands**
> It is our position that the PFRA obtained proper authorization for the use and occupancy of land on the Muscowpetung and Pasqua reserves pursuant to section 34 of the *Indian Act* of 1927. Canada did not compensate the Muscowpetung and Pasqua bands in respect of their flooded reserve lands in the 1940's, but eventually paid adequate compensation in 1977. In addition, the Muscowpetung and Pasqua band councils have provided Canada with effective releases with respect to compensation for the flooding of their lands by way of Band Council Resolutions authorizing the flooding. Accordingly, it is Canada's view that no lawful obligation is owed to either the Muscowpetung or Pasqua bands.
>
> **Standing Buffalo Reserve Lands**
> Upon our review of the file it does not appear that Canada was aware that Standing Buffalo reserve lands would be affected by flooding in the 1940's. Although the Standing Buffalo band council passed a Band Council Resolution in 1977 releasing Canada for the flooding of the band's land, it does not appear that Canada issued a permit at that time for the flooding. Therefore, we are prepared to negotiate based on the band's submission that there exists no authority for the flooding of their lands. Any compensation paid to the band in exchange for their consent for the Minister to issue a permit should take into account the compensation paid to the band in 1977 by way of set-off.[10]

Canada was not prepared to deal with the claim as it related to Piapot, since the flooding of that reserve appeared to result from upstream releases of water rather than the construction and use of the Echo Lake Dam. Hughes added that Canada had three means of authorizing the flooding of reserve lands – surrender, expropriation, or authorization under section 34 of the *Indian Act* – and that it had apparently authorized use and occupation under section 34.[11]

In the second letter, which dealt with the four eastern First Nations, Hughes informed Lerat that Canada had reached the preliminary position that it owed no lawful obligation because, again, it had authorized the use and occupation of reserve lands under section 34. However, Canada was prepared to consider additional submissions from QVIDA with regard to the adequacy of the compensation paid for the use and occupation of these lands as well as compensation to Sakimay for funds expended to move a house to higher ground and for damages associated with road flooding.[12]

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[10] Jack Hughes, Research Manager, Prairies, Specific Claims West, Department of Indian and Northern Affairs, to Gordon Lerat, QVIDA Co-ordinator, March 29, 1995. Note that the date on the letter appears to be in error and that the proper date should be March 29, 1996.

[11] Jack Hughes, Research Manager, Prairies, Specific Claims West, Department of Indian and Northern Affairs, to Gordon Lerat, QVIDA Co-ordinator, March 29, 199[6].

At the fourth planning conference, Canada acknowledged that its rejection of the flooding claim in relation to the four eastern First Nations had not addressed the impact, if any, suffered by Kahkewistahaw. It was at this point that Canada agreed to review Kahkewistahaw's claim and provide a response. Canada also conceded that it had not proceeded by way of "surrender [or]expropriation nor did it secure a permit for the lands now flooded by construction of the dams at Echo Lake, Round Lake or Crooked Lake."[13]

The fifth planning conference was convened in Regina on May 14, 1996. The parties agreed that, because Canada had accepted Standing Buffalo's claim for negotiation, Standing Buffalo would no longer be a party to the inquiry. Kahkewistahaw at that time intended to remain a party to the inquiry "unless and until Canada offers to accept Kahkewistahaw's claim for negotiation and that offer is accepted by the First Nation."[14]

By the time the last planning conference took place on February 28, 1997, however, Canada had changed its position with regard to Standing Buffalo and informed the First Nation that it was no longer willing to negotiate the First Nation's flooding claim. Kahkewistahaw's submission was still not complete, however, and Chief Amanda Louison considered withdrawing the First Nation's portion of the claim to allow the inquiry to proceed without further delay.[15] In short order, Standing Buffalo had elected to participate in the inquiry, and Kahkewistahaw had decided it would not participate.

THE INQUIRY

To assist the Commission in its deliberations, the parties tendered more than 1300 pages of historical documents, a further 35 exhibits consisting of several thousand more pages of material, and a video prepared by the Federation of Saskatchewan Indian Nations. In four separate community sessions, the Commission also received oral evidence from elders of the six participating First Nations, as well as testimony from elders of the Kahkewistahaw First Nation, which, at the time of the community session in which its members took part, was still part of the inquiry.

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[12] Jack Hughes, Research Manager, Prairies, Specific Claims West, Department of Indian and Northern Affairs, to Gordon Lerat, QVIDA Co-ordinator, March 29, 199[6].

[13] Indian Claims Commission Planning Conference, Qu'Appelle Valley Indian Development Authority, April 3, 1996, p. 3.

[14] Indian Claims Commission Planning Conference, Qu'Appelle Valley Indian Development Authority, May 14, 1996, p. 6.

[15] Indian Claims Commission Planning Conference, Qu'Appelle Valley Indian Development Authority, March 4, 1997, pp. 3-4.

The first community session was a joint meeting of the four eastern QVIDA First Nations held in the Community Hall on the Sakimay reserve on September 18, 1996. The Commissioners heard from elders George Ponicappo, Alex Wolfe, Marie Kaye, Raymond Acoose, Edna Sangwais, Emma Panipekeesick, Jimmy Wahpooseywan, and Leonard Kequahtooway of Sakimay; Joseph Crowe, John Alexson, Mervin Bob, Allan McKay, and Urbin Louison of Kahkewistahaw; Henry Delorme of Cowessess; and Margaret Bear, Marlowe Kenny, Arthur George, and Calvin George of Ochapowace.

The second session was conducted in the Pasqua Band Hall on October 2, 1996. The participants included the following elders from the Pasqua First Nation: David Obey, Stanley Pasqua, Clara Pasqua, Andrew Gordon, Raymond Gordon, Clayton Cyr, Lawrence Stevenson, Jimmy Iron Eagle, George Kahnapace, Lawrence Chicoose, Agnes Cyr, Dora B. Stevenson, Marsha Gordon, Bernard Gordon, Edith Merrifield, and Ina Kahnapace. The following day the Commissioners convened another community session in the Muscowpetung School gymnasium to hear the evidence of 11 elders of the Muscowpetung First Nation: Calvin Poitras Sr, Violet Keepness, Isabelle Keepness, William Pratt, Evelyn Cappo, Winonah Toto, Ervin Toto, Earl Cappo, Paul Poitras, Norma Cappo, and Eugene Anaquod.

Finally, after Standing Buffalo's participation in the inquiry had been confirmed, the fourth and final community session was held on April 4, 1997, at the Standing Buffalo Cultural Centre to hear from that First Nation's elders. Testifying were Charlie Buffalo, Susan Yuzicappi, Isabelle Jackson, Felix Bearshield, Ken Goodwill, Clifford Goodwill, Tony Yuzicappi, and – through Band Councillor Velma Bear – Cecil Wajunta, Victor Redman, Catherine Goodfeather, and Celina Wajunta.

Counsel for the QVIDA First Nations submitted written arguments to the Commission on May 5, 1997, to which counsel for Canada replied on June 6, 1997. Oral submissions were made at a final session in Regina on June 26, 1997.

A complete summary of the written submissions, documentary evidence, transcripts, and the balance of the record in this inquiry is set forth in Appendix A of this report.

PART II

HISTORICAL BACKGROUND

TREATY 4

The circumstances forming the backdrop to the present claim of the QVIDA First Nations originated in the signing of Treaty 4 in 1874 by representatives of the government of Canada and by the Cree, Saulteaux, and other Indians of what is now southern Saskatchewan. By that time, white settlers and traders had arrived in the British North-West Territories. The demise of the buffalo, to which many Indians owed their existence, was already foreseen. It was a time of considerable upheaval and turmoil, as bands and individual Indians sought, in many tragic cases unsuccessfully, to find the best way to survive in a rapidly changing world. People were on the move, both geographically and from band to band, as they tried to identify whether their prospects would be better served by continuing the hunt or by settling on reserves and taking up agriculture and other pursuits. Canada and the prairie Indians recognized that, with the expected arrival of more and more white settlers, it was essential to formalize relations to give some protection to aboriginal interests.

In its previous reports dealing with the treaty land entitlement inquiries of the Kawacatoose and the Kahkewistahaw First Nations, the Commission has already reviewed at some length the events that spurred Canada and the Indians to enter into Treaty 4.[16] We do not propose to consider those events further in this report, other than to identify the relevant signatories to the treaty and to note the specific treaty provisions spawned by the negotiations.

Treaty 4, which became known as the Qu'Appelle Treaty, was first executed at the Qu'Appelle Lakes on September 15, 1874, with the initial signatories including the Chiefs of four of the present eight QVIDA First Nations: Cowessess ("Ka-wezauce," also known as "The Little Boy" or "The Little

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[16] Indian Claims Commission (ICC), *Report on Kawacatoose First Nation Treaty Land Entitlement Inquiry* (Ottawa, March 1996), (1996) 5 *Indian Claims Commission Proceedings* (ICCP) at 73; ICC, *Report on Kahkewistahaw First Nation Treaty Land Entitlement Inquiry* (Ottawa, February 1996).

Child"), Pasqua ("The Plain"), Kahkewistahaw ("Him that flies around"), and finally Kakisheway ("Loud Voice") and Chacachas (whose bands later merged to become Ochapowace). At the subsequent meeting with bands in the Fort Ellice area on September 21, 1874, the Treaty Commissioners included the Sakimay ("Mosquito") people as members of Waywaysecappo's band. Cheekuk signed an adhesion to the treaty on behalf of Muscowpetung on September 8, 1975, and Piapot ("Payepot") adhered the next day.

The lone exception was the Standing Buffalo Band, which descended from Minnesota Sioux Indians who came to Canada as refugees of the American Sioux War of 1862-63. As such, they were apparently excluded from Treaty 4, although they were later encouraged to settle within the Treaty 4 area as long as the location they chose was not close to the American border.[17]

Under the terms of Treaty 4, the adhering Indians agreed to "cede, release, surrender and yield up" to Canada "all their rights, titles and privileges" to some 75,000 square miles of land encompassed by the treaty. In exchange, Canada agreed to set apart reserves for the Indians,

> such reserves to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, after conference with each band of the Indians, and to be of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families; provided, however, that it be understood that, if at the time of the selection of any reserves, as aforesaid, there are any settlers within the bounds of the lands reserved for any band, Her Majesty retains the right to deal with such settlers as She shall deem just, so as not to diminish the extent of land allotted to the Indians; and provided, further, that *the aforesaid reserves of land, or any part thereof, or any interest or right therein, or appurtenant thereto, may be sold, leased or otherwise disposed of by the said Government for the use and benefit of the said Indians, with the consent of the Indians entitled thereto first had and obtained, but in no wise shall the said Indians, or any of them, be entitled to sell or otherwise alienate any of the lands allotted to them as reserves.*[18]

The treaty further stipulated that Canada would provide treaty annuities to each Indian man, woman, and child, as well as agricultural implements and seed to assist those bands that were ready to settle and convert to an agrarian lifestyle. For those Indians who were not yet ready to settle, the treaty provided that they were to receive "powder, shot, ball and twine" and assured the following rights with regard to hunting, fishing, and trapping:

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[17] 116782 Canada Ltd., "Qu'Appelle Valley Indian Development Authority Land Claim," April 14, 1986, p. 7 (ICC Exhibit 5).

[18] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), p. 6. Emphasis added.

> And further, Her Majesty agrees that Her said Indians shall have right to pursue their avocations of hunting, trapping and fishing throughout the tract surrendered, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining or other purposes, under grant or other right given by Her Majesty's said Government.[19]

Finally, for the purposes of the present inquiry, the following provision of the treaty is also relevant:

> It is further agreed between Her Majesty and Her said Indian subjects that *such sections of the reserves above indicated as may at any time be required for public works or building of whatsoever nature may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made to the Indians for the value of any improvements thereon, and an equivalent in land or money for the area of the reserve so appropriated.*[20]

SELECTION OF RESERVES

Within a few years of the initial signing of Treaty 4, survey work on the reserves for the six QVIDA First Nations participating in this inquiry had been commenced, and by 1884 all had been allocated their principal reserves within the Qu'Appelle Valley.[21] The government's policy of promoting reserve agrarianism had begun.

Pasqua

Pasqua's IR 79 was surveyed in October 1876 by Dominion Land Surveyor (DLS) William Wagner along most of the south shore of Pasqua Lake – the most westerly of the four Fishing Lakes – and further upstream for a couple

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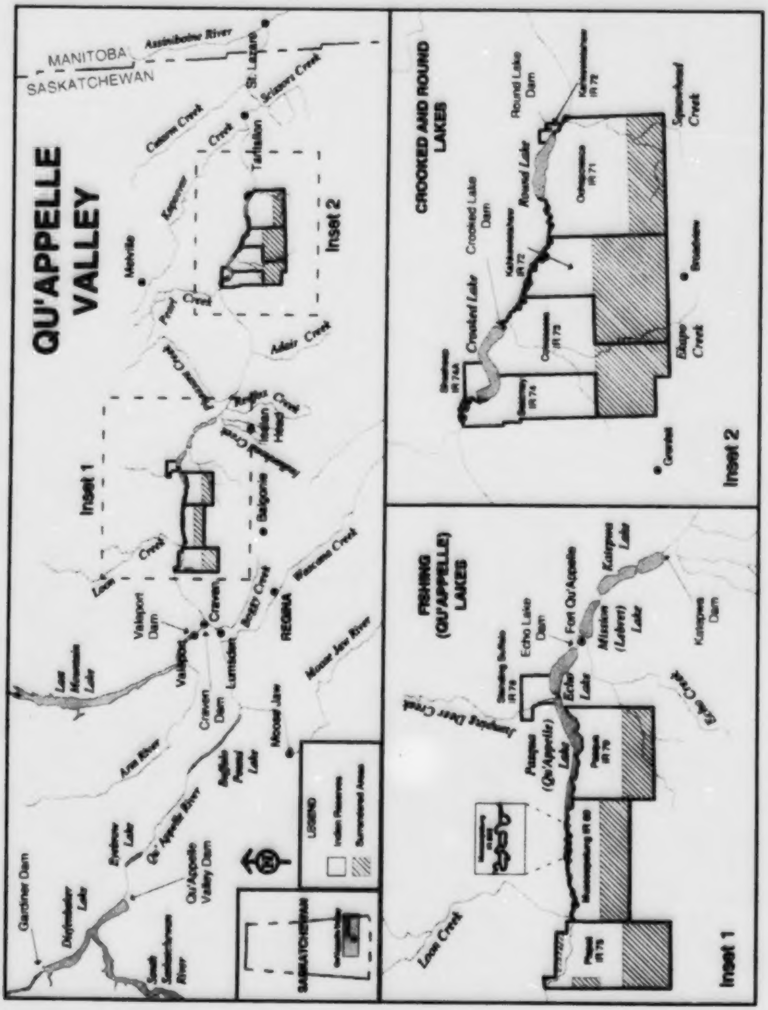
[19] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), p. 7.

[20] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), p. 7. Emphasis added.

[21] It should be noted that the dates of first survey for treaty land entitlement purposes for some of the QVIDA First Nations are or have been in issue before the Commission. The respective dates of first survey for these First Nations are not in issue in these proceedings, however. Any statements that the Commission may make in this report regarding survey dates for any of the First Nations are merely for the purpose of setting the general historical context for this inquiry, based on the limited evidence before us at this time, and do not represent the findings or views of the Commission on the subject of the respective First Nations' dates of first survey.


QU'APPELLE VALLEY
MANITOBA
SASKATCHEWAN
Assiniboine River
St. Lazare
Scissors Creek
Cutarm Creek
Kaposvar Creek
Tantallon
Melville
Pheasant Creek
Adair Creek
Inset 1
Inset 2
Loon Creek
Indian Head
Balgonie
Valeport Dam
Valeport
Craven
Lumsden
Craven Dam
REGINA
Boggy Creek
Wascana Creek
Moose Jaw River
Moose Jaw
Last Mountain Lake
Arm River
Buffalo Pound Lake
Qu'Appelle River
Eyebrow Lake
Qu'Appelle Valley Dam
Gardiner Dam
Diefenbaker Lake
South Saskatchewan River
LEGEND
Indian Reserves
Surrendered Area
SASKATCHEWAN
CROOKED AND ROUND LAKES
Crooked Lake
Crooked Lake Dam
Round Lake
Round Lake Dam
Kahkewistahaw IR 72
Cowessess IR 73
Ochapowace IR 71
Sakimay IR 74
Shesheep IR 74A
Spearhead Creek
Broadview
Ekapo Creek
Grenfell
Inset 2
FISHING (QU'APPELLE) LAKES
Echo Lake Dam
Fort Qu'Appelle
Standing Buffalo IR 78
Jumping Deer Creek
Pasqua (Qu'Appelle) Lake
Pasqua IR 79
Echo Lake
Mission (Lebret) Lake
Katepwa Lake
Katepwa Dam
Muscowpetung IR 80
Piapot IR 75
Loon Creek
Inset 1

of miles along the meandering course of the Qu'Appelle River. The original reserve contained 60.15 square miles, or 38,496 acres,[22] described by Wagner in these terms:

> The soil in this reserve is a clay loam of first quality. The surface is level, and undulating, and partially wooded with poplar and willow. Fish and wild-fowl abound in the lake and swamps in the valley of the Qu'Appelle.[23]

Muscowpetung

Muscowpetung's band attempted to survey its own reserve immediately after adhering to Treaty 4 in 1875, but Cheekuk, who had signed the adhesion, died during the final leg of the work and it was never completed.[24] Eventually, in November 1881, district land surveyor John C. Nelson began to mark off IR 80 along the south side of the Qu'Appelle River immediately upstream of Pasqua's reserve, but he was interrupted by the onset of winter. He returned in May 1882 to find that, at the request of the Chief and the Band, Indian Agent Alan McDonald had extended the proposed reserve four miles west along the Qu'Appelle River, and had reduced its depth by 2½ miles, to provide the Band with more building wood.[25] Ultimately, IR 80 contained 58.8 square miles, or 37,632 acres, and the Band received a further 472.9 acres as Hay Reserve 80B, which it was to share with other bands.[26] With regard to IR 80, Nelson reported:

> Like most of the choice land of the Qu'Appelle district the soil of this reserve is nearly all first-class. There are groves of small poplar and clumps of willow, and in the gullies leading to the Qu'Appelle Valley there is a considerable supply of good poplar for building and fencing purposes, and a few small maples. The bottoms along the

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[22] 116782 Canada Ltd., "Qu'Appelle Valley Indian Development Authority Land Claim," April 14, 1986, p. 8 (ICC Exhibit 5). On June 5, 1906, the Pasqua Band surrendered 25.12 square miles, or 16,077 acres (41.8%), of its reserve, leaving it with 35.03 square miles, or 22,419 acres: 116782 Canada Ltd., "Qu'Appelle Valley Indian Development Authority Land Claim," April 14, 1986, p. 18 (ICC Exhibit 5).

[23] Treaty No. 4, North-West Territories, Indian Reserve No. 79, Chief "Pasquaw," surveyed by William Wagner, DLS, October 1876 (ICC Exhibit 29B).

[24] Blair Stonechild, Indian Consultant Enterprises, "A Historical Overview of the Occupancy in the Valley of the Qu'Appelle Valley Bands" (March 1992), tab 2, p. 22, in Indian Consultant Enterprises, "Past Damages Compensation Study" (March 1992) (ICC Exhibit 3).

[25] A. McDonald, Indian Agent, Treaty 4, to Superintendent General of Indian Affairs, May 9, 1882, Canada, Department of Indian Affairs, *Annual Report*, 1882 (ICC Documents, p. 18).

[26] Blair Stonechild, Indian Consultant Enterprises, "A Historical Overview of the Occupancy in the Valley of the Qu'Appelle Valley Bands" (March 1992), tab 2, p. 22, in Indian Consultant Enterprises, "Past Damages Compensation Study" (March 1992) (ICC Exhibit 3). On January 4, 1909, the Muscowpetung Band surrendered 27.5 square miles, or 17,600 acres (46.8%), of IR 80, leaving it with 31.3 square miles, or 20,032 acres, from that reserve: 116782 Canada Ltd., "Qu'Appelle Valley Indian Development Authority Land Claim," April 14, 1986, p. 18 (ICC Exhibit 5).

> river are valuable for the immense quantity of hay which can be cut on the less elevated parts of them. The best bottom is at the north-west corner of the reserve at the mouth of Prairie Creek and nearly opposite Long Valley Creek.[27]

Nelson also described the hay lands in IR 80B as being "of the best quality."[28]

Standing Buffalo

Standing Buffalo died in 1869, but some of his followers had already camped in the vicinity of Fort Qu'Appelle. Although the Band was not permitted to adhere to Treaty 4, Lieutenant Governor Alexander Morris encouraged the Band to select a reserve, and in early November 1881 Nelson surveyed IR 78 along the north side of Pasqua and Echo Lakes and the intervening reach of the Qu'Appelle River. Since the Band was not a signatory to Treaty 4, IR 78 contained only 7.6 square miles, or 4864 acres – an allocation of only 80 acres per family of five rather than the one square mile per family of five stipulated by the treaty.[29] Of this reserve, Nelson commented:

> This reservation has a remarkably beautiful situation. It has an area of seven and a half square miles, bounded on the west side by Jumping Creek, and on the front by the Qu'Appelles. The soil is a clay loam of the first order, and there is [an]abundance of wood. Hay is scarce and consequently a small meadow was reserved at the extensive hay grounds farther up the river.[30]

Sakimay, Cowessess, and Ochapowace

In 1876, surveyor William Wagner surveyed reserves for the Sakimay, Starblanket, and Kakisheway Bands along the entire north shore of the Qu'Appelle River from a point upstream of Crooked Lake to a point below Round Lake. Two other reserves were surveyed on the other side of the river in the vicinity of Round Lake for Kahkewistahaw and Chacachas. In 1880, O'Soup (joined later by Cowessess) was situated by surveyors Allan Poyntz Patrick and William Johnson on the south shore of eastern Crooked Lake and a few miles of the Qu'Appelle River downstream.

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[27] John C. Nelson, DLS, Indian Reserve Survey, to Superintendent General of Indian Affairs, December 29, 1882, Canada, Department of Indian Affairs, *Annual Report*, 1882 (ICC Documents, p. 33).

[28] Treaty No. 4, North-West Territories, Indian Reserve No. 80B, Hay-Lands for the Bands of "Muscowpetung" & Others, surveyed by John C. Nelson, DLS, November 1881 (ICC Exhibit 29B).

[29] Blair Stonechild, Indian Consultant Enterprises, "A Historical Overview of the Occupancy in the Valley of the Qu'Appelle Valley Bands" (March 1992), tab 2, pp. 33-34, in Indian Consultant Enterprises, "Past Damages Compensation Study" (March 1992) (ICC Exhibit 3); 116782 Canada Ltd., "Qu'Appelle Valley Indian Development Authority Land Claim," April 14, 1986, pp. 7 and 9 (ICC Exhibit 5). The Band surrendered 2.59 acres on January 12, 1897, but later received additional areas of 406 acres on May 23, 1930, 144 acres on June 7, 1956, and 187.4 acres on July 12, 1956, for a reserve that eventually totalled 8.75 square miles, or 5598.81 acres: 116782 Canada Ltd., "Qu'Appelle Valley Indian Development Authority Land Claim," April 14, 1986, pp. 9 and 18 (ICC Exhibit 5).

[30] John C. Nelson, DLS, Indian Reserve Survey, Treaties Nos. 4 and 7, January 10, 1882, Canada, Department of Indian Affairs, *Annual Report*, 1881 (ICC Documents, p. 9). The upstream hay grounds referred to by Nelson likely meant IR 80B, which had been set apart for Muscowpetung and "others."

By 1881, the three bands on the north side of the river were expressing their dissatisfaction with the lack of wood and other resources on their reserves, and Nelson extensively revised the boundaries of all six reserves. Sakimay was moved to IR 74 south of the river at the west end of Crooked Lake, while Kakisheway and Chacachas were consolidated on IR 71 along the south shore of Round Lake and some distance both upstream and down. O'Soup's IR 73 remained in much the same location south of Crooked Lake and east along the Qu'Appelle River, although five miles of river frontage at the east end became the new Kahkewistahaw IR 72 flanked by Cowessess to the west and Ochapowace to the east. Starblanket relocated to a more northerly site outside the Qu'Appelle Valley.

Nelson's impressions of the 33.88 square mile (21,683.2 acre) Sakimay reserve were as follows:

> The reserve is undulating prairie interspersed with groves of poplar and clumps of willow, with the exception of the part along the Qu'Appelle Valley, which is broken by ravines and heavily wooded with poplar and balm of Gilead. Ponds frequently occur throughout the prairie portion. The land throughout is of the choicest quality.[31]

This reserve was extended to the north shore of the Qu'Appelle River at the west end of Crooked Lake in 1884 to provide separate land for a faction of the Band that refused to take government assistance. The new Shesheep IR 74A comprised 5.6 square miles, or 3584 acres, about which Nelson wrote:

> This reserve is greatly cut up with coulées in which there is a considerable supply of poplar and maple. Along the Qu'Appelle River the land is swampy. On the high prairie the soil is a very good black loam with some boulders on the surface.[32]

In 1883, Nelson added 15 square miles, or 9600 acres, to the 63 square mile (40,320 acre) reserve he had surveyed for O'Soup in 1881. He explained his reasons in describing the reserve:

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[31] Treaty No. 4, North-West Territories, Indian Reserve No. 74, Chief "Sakimay," surveyed by John C. Nelson, DLS, November 1881 (ICC Exhibit 29B).

[32] Treaty No. 4, North-West Territories, Indian Reserve No. 74A at Crooked Lake, "Sheesheep's" Band, surveyed by John C. Nelson, DLS, 1884 (ICC Exhibit 29B).

> This reserve is well watered by "Ecapo" or Weed Creek, which flows through an immense wooded ravine and empties into the Qu'Appelle River. Along the creek it is heavily wooded with poplar, balm of Gilead and some elm. The south-western part is undulating prairie with clumps of willow and poplar. The soil throughout is of choice quality. There are several mill sites on Weed Creek.
>
> This reserve was originally allotted to the band of Chief "O'Soup", and contained an area of sixty-three square miles, which was considered sufficient to meet the requirements of the band at that time. An extension of fifteen square miles was subsequently added by special order of the Department, as it was thought "Cowessess" would bring many Indians with him from the plains, when he assumed the chieftainship.[33]

Following the death of Kakisheway in 1884, his son Ochapowace was elected as the new chief of the combined Kakisheway and Chacachas Bands. The consolidated IR 71 set apart for Ochapowace's band in 1881 comprised 82.6 square miles, or 52,864 acres, about which Nelson commented:

> The southern portion of the reserve is an undulating prairie with numerous ponds, hay swamps and scattering bluffs and poplar and clumps of willow. The northern part slopes gently towards the Qu'Appelle River, and is thickly wooded with poplar and balm of Gilead. Along the valley of the Qu'Appelle and the eastern boundary, the land is much broken by immense ravines which extend back from the river, and are heavily wooded with poplar, willow, a few oaks, ash and birch. The soil is a rich sandy loam, with some gravelly spots and a few boulders.
>
> The fishing in Round Lake is said to be good.[34]

DEVELOPMENT OF AGRARIAN ECONOMIES

Although the record in this inquiry includes the annual reports of Canada's Indian agents and other representatives until only 1905, these reports speak for themselves as to the kind of progress made by the Qu'Appelle Valley Bands in the early years following the selection of their reserves. There are also many comments that illustrate the resources available to the Bands and some of the difficult conditions that the people were forced to endure.

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[33] Treaty No. 4, North-West Territories, Indian Reserve No. 73, Chief "Cowessess," surveyed by John C. Nelson, DLS, August 1881 (ICC Exhibit 29B). On January 29, 1907, the Cowessess Band surrendered 32.35 square miles, or 20,704 acres (41.5%), of its reserve. It surrendered a further 350 acres on November 13, 1908, leaving it with 45.1 square miles, or 28,866 acres: 116782 Canada Ltd., "Qu'Appelle Valley Indian Development Authority Land Claim," April 14, 1986, p. 19 (ICC Exhibit 5).

[34] Treaty No. 4, North-West Territories, Indian Reserve No. 71 at Round Lake, Chiefs "Kakeesheway" and Chacachas, surveyed by John C. Nelson, DLS, August, 1881 (ICC Exhibit 29B). After the First World War, the Ochapowace Band surrendered 28.5 square miles, or 18,240 acres (34.5%), of its reserve on June 30, 1919, leaving it with 54.1 square miles, or 34,624 acres: 116782 Canada Ltd., "Qu'Appelle Valley Indian Development Authority Land Claim," April 14, 1986, pp. 19-20 (ICC Exhibit 5).

The Eastern Bands

By 1883, the federal government had introduced its policy of removing Indians from the Cypress Hills and the vicinity of the American border,[35] and Indians who had made their way south to continue the hunt were rejoining – at times under armed guard – their bands as the great herds of buffalo dwindled to near extinction. Although there were obvious adjustments to be made by both settled Indians and returning nomads, Indian Commissioner Edgar Dewdney's tone was optimistic:

> The eastern section of Treaty 4, under [Indian Agent] Col. Macdonald, has made great strides during the past season, although the new arrivals from the south somewhat demoralized them for a time. The Crooked Lakes Reserve, upon which "O'Soup," "Little Child," "Mosquito" and "Kah-kee-wis-ta-how" are settled, has raised very fine crops of wheat, barley, Indian corn and vegetables. Most of the Indians have abandoned their blankets, and many earn money working along the line of railway, which passes close to the reserve. A few more cattle and implements given these Indians will, our Agent thinks, render them self-sustaining.[36]

Indian Agent Alan McDonald commented that Muscowpetung possessed "one of the best reserves in the Treaty for agricultural purposes, but I regret to say there is but a limited supply of wood."[37]

Three years later, in 1886, McDonald trumpeted the progress made by the bands in his Crooked Lake Agency:

> Taking our crops of wheat and potatoes as a whole, and comparing them with the settlers, the Indians on these reserves have not much reason to complain. . . .
>
> The Indians have worked most creditably this spring: the ploughing, seeding and fencing being equal to that of the settler, and it is my opinion the Indian fairly realizes the advantage gained by work.[38]

The following year, McDonald commented on the prodigious quantities of hay that the reserves were capable of producing:

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[35] Details of this policy were fully canvassed in the Commission's report on the treaty land entitlement inquiry for the Lucky Man Band: see ICC, *Report on Lucky Man Band Treaty Land Entitlement Inquiry* (Ottawa, February 1997).

[36] E. Dewdney, Indian Commissioner, to Superintendent General of Indian Affairs, October 2, 1883, Canada, Department of Indian Affairs, *Annual Report*, 1883, (ICC Documents, p. 47).

[37] A. McDonald, Indian Agent, Crooked Lake Agency, to Superintendent General of Indian Affairs, July 6, 1883, Canada, Department of Indian Affairs, *Annual Report*, 1883, (ICC Documents, p. 38).

[38] A. McDonald, Indian Agent, Crooked Lake Agency, to Superintendent General of Indian Affairs, August 26, 1886, Canada, Department of Indian Affairs, *Annual Report*, 1886, (ICC Documents, p. 75).

> After sufficient hay was secured for wintering the stock, several Indians put up a quantity for sale. "Yellow Calf" and his party [from Sakimay] sold sufficient to pay for two mowing machines and horse rakes, and to purchase tea and other necessaries for the winter. The total amount realized from the sale of hay was $476. Sixty-four tons were sold to the Commissioner of the North-West Mounted Police, and shipped to Regina *viá* Canada Pacific Railway.[39]

The critical importance of precipitation and moisture to farming efforts in the valley was evident in McDonald's report in 1888. He also remarked on the already declining trapping industry:

> [T]his is the first season, since the Indians came on these reserves, that prospects look so bright, and I am glad to say that several Indians, who have kept aloof from farming, have now commenced, ***with the hope of having wet seasons*** and good crops for the next five years. . . .
>
> Owing to the decrease of fur-bearing animals over the district in which these Indians trap, the catch last winter was much smaller than formerly. On careful enquiry I think there could not have been more than $1,100 realized from furs, and about $150 from fish, the latter being mostly consumed by themselves. Very little was sold.[40]

To this report, Dewdney added:

> They [the Sakimay Band] put up in last season 350 tons of hay, which will be sufficient to feed their cattle, of which animals they own 55, and individual members possess 50, and will leave a surplus of 75 tons for sale.[41]

By 1889 it was recognized that lands in the vicinity of Round and Crooked Lakes were subject to periodic droughts, and steps were already being taken to counteract the effects of these dry years:

> This has been the driest year since 1874, and judging from the crops raised by one of the Indians on Reserve No. 73 (Coweses) I am confident if the above system [of summer fallowing] is carried out an average return will be forthcoming in our dryest [sic] seasons. The crops up to the middle of June looked most promising, but the hot winds of the 28th June checked the growth, and had we not had rain in the beginning of July the crop with the exception of Gaddie's would have been a total loss. . . .

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[39] A. McDonald, Indian Agent, Crooked Lake Agency, to Superintendent General of Indian Affairs, September 13, 1887, Canada, Department of Indian Affairs, *Annual Report*, 1887, (ICC Documents, p. 83).

[40] A. McDonald, Indian Agent, Crooked Lake Agency, to Superintendent General of Indian Affairs, September 13, 1887, Canada, Department of Indian Affairs, *Annual Report*, 1887, (ICC Documents, p. 83). Emphasis added.

[41] E. Dewdney, Superintendent General of Indian Affairs, to Sir Frederick Arthur Stanley, Governor General, January 1, 1889, Canada, Department of Indian Affairs, *Annual Report*, 1888, (ICC Documents, p. 101).

> The Indians having secured a large quantity of hay for the wintering of their stock, the cattle turned out in the spring in excellent condition.[42]

McDonald's subsequent report showed that his guarded optimism in 1889 had been dashed by further hot, dry weather:

> The crops of last year were a failure. At one time they looked promising, but the continuous dry weather checked their growth.
>
> The hay crop also suffered. It was with great difficulty the Indians on Cowesess' Reserve, number 73, and Sakimay's Reserve, number 74, secured sufficient hay for wintering their stock. Without mowing machines it would have been impossible for them to cut what they required, as two or three acres in some cases had to be gone over before a ton was procured. The Indians on the other two reserves, viz.: Ochapowace, number 71, and Kah-ke-wis-ta-haw, number 72, were more fortunate; for, in addition to that which they required for their cattle, about thirty tons were put up for sale. . . .
>
> She-Sheep's party on reserve number 74, secured a large quantity of hay, with which they were able to winter fifty-one head of stock for settlers adjacent to their reserve, realizing therefrom, $250.[43]

In succeeding years, McDonald and his successors as Indian agent commented frequently on the successes achieved by the Bands of the Crooked Lake Agency in producing hay, cattle, grain, and root crops. Digging senega root became an important and relatively lucrative alternative source of income for these Bands.[44] The reserves also contained supplies of dry wood that could be sold as firewood. Fishing in Crooked and Round Lakes consistently supplemented the diet of Band members, but little or no excess was caught for sale. McDonald reported again in 1892 and 1893 on the "steadily decreasing" catch of furs, "owing partly to fur-bearing animals being scarcer, and the fact of the best hunters being now the best farmers who have to stay at home on their farms";[45] by 1895 "[t]he catch of furs is so small now as to be of no account in finance."[46]

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[42] A. McDonald, Indian Agent, Crooked Lake Agency, to Superintendent General of Indian Affairs, September 20, 1889, Canada, Department of Indian Affairs, *Annual Report*, 1889, (ICC Documents, p. 105).

[43] A. McDonald, Indian Agent, Crooked Lake Agency, to Superintendent General of Indian Affairs, September 25, 1890, Canada, Department of Indian Affairs, *Annual Report*, 1890, (ICC Documents, p. 115).

[44] A. McDonald, Indian Agent, Crooked Lake Agency, to Superintendent General of Indian Affairs, July 31, 1893, Canada, Department of Indian Affairs, *Annual Report*, 1893, (ICC Documents, p. 160).

[45] A. McDonald, Indian Agent, Crooked Lake Agency, to Superintendent General of Indian Affairs, July 30, 1892, Canada, Department of Indian Affairs, *Annual Report*, 1892, (ICC Documents, p. 150).

[46] A. McDonald, Indian Agent, Crooked Lake Agency, to Superintendent General of Indian Affairs, July 20, 1895, Canada, Department of Indian Affairs, *Annual Report*, 1894/95, (ICC Documents, p. 197).

The most important variable in the economic life of the Bands was the weather. The early 1890s in particular were marked by mixed success, with some years providing encouraging results and others ending with crop failures and damage from heat and drought, notwithstanding improvements in the Bands' farming practices. In 1891, McDonald reported:

> The last year's crop was the best we have had since these Indians commenced farming. . . .
>
> The hay crop was much better than last year, but owing to unfavourable weather there was not much made for sale.[47]

In 1892, he commented:

> I am glad to say the crops, taken as a whole, for the last year were very favourable, and for quantity were greatly in excess of all former years, but the prices realized by the Indians for their wheat ruled rather lower. . . .
>
> The hay crop was a favourable one, the Indians stacking nine hundred and seventy tons, of which they sold ninety tons, the balance being used to feed their stock. . . .
>
> The crops are looking well, but are short in the straw, owing to the long continued dry weather and lack of rain in June, but just at the last of the month a good supply came, and although I do not anticipate an extraordinary crop, I certainly expect an average one, as the good effect of the deferred rain, when it came, was apparent at once.[48]

The 1893 report stated:

> The crops raised by my Indians last year were rather less in quantity than was the case the previous year, which was due to the season and not to inferior farming, as I am pleased to report that a steady advance is observable in the methods adopted in agricultural operations on nearly all the Indian farms. . . .
>
> The hay crop was an average one, the Indians stacking nine hundred and eighty-eight tons, which was about the usual quantity they were accustomed to put up, and which of late years has been sufficient to carry their stock well through the winter and give them some hay to sell in the spring.[49]

The dry 1894 season proved to be particularly discouraging:

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[47] A. McDonald, Indian Agent, Crooked Lake Agency, to Superintendent General of Indian Affairs, August 12, 1891, Canada, Department of Indian Affairs, *Annual Report*, 1891, (ICC Documents, p. 126).

[48] A. McDonald, Indian Agent, Crooked Lake Agency, to Superintendent General of Indian Affairs, July 30, 1892, Canada, Department of Indian Affairs, *Annual Report*, 1892, (ICC Documents, pp. 147-49 and 151).

[49] A. McDonald, Indian Agent, Crooked Lake Agency, to Superintendent General of Indian Affairs, July 31, 1893, Canada, Department of Indian Affairs, *Annual Report*, 1893, (ICC Documents, pp. 158 and 161).

> Seeding this spring commenced about the usual time and the early promise of a good crop was assuring, but the great scarcity of rain later on makes it look as if the coming harvest was to be the lightest yield my Indians have ever known, which is very discouraging as they not only worked well, but were amenable to the practical advice given them as to summer-fallowing, etc., and put in their seed on land which for the most part could not have been much better prepared. . . .
>
> The farmers sowed nineteen acres of oats for the use of their horses, the yield from which will be very poor owing to the excessive drought.
>
> The hay crop, owing to the dry season, will be light, although enough will be secured for winter provision.[50]

Although 1895 promised favourable returns, McDonald continued his lament on the poor 1894 season:

> As prognosticated in my last report, the crop harvested during the current year has proved very light. . . .
>
> This was entirely due to the extraordinarily dry season, which was the dryest [sic] I have seen in this country for the past twenty years. . . .
>
> The comparative failure is owing to the dry season. . . .
>
> There is a greater acreage under crop than last year by 22½ acres, and the crop has been properly put in on land better prepared than in any previous year, and with the present favourable weather a remarkably good return may be expected this coming harvest. . . .
>
> The hay crop, owing to drought, was a poor one, although sufficient was obtained to winter all the stock comfortably. . . .
>
> One well was dug during the winter on Kahkewistahaw's Reserve, No. 72, owing to a supply running short that had never failed before. . . .
>
> The hay harvest promises to be excellent this summer, and the crop abundant.[51]

In subsequent years, the reporting requirements for the Indian agents changed and, in terms of the Bands' economic development, focused more on reserve resources and Band occupations than on weather conditions and production levels. Even so, Indian Agent J.P. Wright commented in 1898:

> I regret to report that owing to the extreme dry season we have had this year so far, and to the severe and frequent frosts, our crops are about a total failure. . . .

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[50] A. McDonald, Indian Agent, Crooked Lake Agency, to Superintendent General of Indian Affairs, July 20, 1894, Canada, Department of Indian Affairs, *Annual Report*, 1893/94, (ICC Documents, p. 174).

[51] A. McDonald, Indian Agent, Crooked Lake Agency, to Superintendent General of Indian Affairs, July 20, 1895, Canada, Department of Indian Affairs, *Annual Report*, 1894/95, (ICC Documents, pp. 193-94 and 196).

> This has been an exceptionally unfortunate year for farming operations in this district, and most discouraging to the Indians, the whole of their hard work being destroyed.[52]

In summary, these later reports demonstrated the reliance of the Crooked Lake Agency Bands on sales of hay, firewood, and senega root, together with mixed farming and, using the Bands' own hay supplies, raising stock. Fishing provided an important supplementary food supply for the Ochapowace and Sakimay Bands, and to a lesser extent for Cowessess, but did not constitute a significant source of income.

The Western Bands

The Muscowpetung Agency, which served the four western Qu'Appelle Valley Bands, opened under the stewardship of Indian Agent J.B. Lash on July 1, 1885, after the North-West Rebellion. The hay grounds in the agency already formed a significant component of the Bands' economies:

> The hay grounds on Piapot's and Muscowpetung's Reserves have been turned to good account, and the result of last year's work has encouraged the Indians and in a substantial manner proved to them the benefit of assisting themselves. Two hundred tons of hay were sold and delivered in Regina to the North-West Mounted Police and others.[53]

The problems posed by the weather were no less daunting for the western Bands than for those to the east. Lash commented in 1886 on the impact of drought conditions the preceding year and his attempts to encourage the Indians to diversify their operations:

> The result of last year's experience in trying to farm successfully in the valley in this agency thoroughly convinced me that a change was necessary, as the changes in the temperature had more effect on the crops in the low land. However, to convince the Indians was not so easy, as to come on the bench necessitated breaking and fencing new land. The Indians were notified in good time that seed grain would only be issued for farming on the bench land, and I am pleased to report that the result has been satisfactory, as our crop on the whole promises a fair return. The root crops last year on Piapot's and Muscowpetung's Reserves were very light, owing to the summer

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[52] J.P. Wright, Indian Agent, Crooked Lake Agency, to Superintendent General of Indian Affairs, August 25, 1898, Canada, Department of Indian Affairs, *Annual Report*, 1897/98, (ICC Documents, p. 266).

[53] J.B. Lash, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, August 5, 1886, Canada, Department of Indian Affairs, *Annual Report*, 1886, (ICC Documents, p. 73).

> drought; on Pasquah's Reserve there was a fair yield, and on the Sioux [Standing Buffalo] Reserve a very good crop.
>
> The ground was so hard and dry that very little fall ploughing could be done.
>
> Fully 200 tons of hay were sold and delivered off the reserves. This industry encourages the Indians, as also the freighting from the railway of contract supplies, the result of which can been seen in useful articles, clothing and supplies purchased with the proceeds.[54]

In both 1887 and 1888, Lash remarked on the scarcity of game in the western reserves, which limited the food supply from that source. This scarcity was offset to some degree by good fishing in Pasqua Lake and the successes the Bands were able to achieve in digging senega root and raising cattle.[55] The 1888 crop season also proved productive, but dry conditions prevailed the following year:

> The bountiful harvest of last season and the proceeds from the sale of hay, wood, freighting and general work placed the Indians in this agency in a very independent position and reduced the demands on the Department for food supplies to a large extent. . . .
>
> The acreage under grain this spring was increased fifty per cent. over last year, and the prospects were most encouraging up to the early part of June, but the continuous drought from that date injured the crop and our returns this season will be comparatively small.[56]

Although it appeared that 1889 would have been a productive year for hay, fire swept the Muscowpetung and Pasqua reserves in early October and 572 tons of hay were lost.[57]

In 1890, Lash noted the favourable farming conditions and returns to the Bands:

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[54] J.B. Lash, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, September 7, 1887, Canada, Department of Indian Affairs, *Annual Report*, 1887, (ICC Documents, p. 81).

[55] J.B. Lash, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, September 7, 1887, Canada, Department of Indian Affairs, *Annual Report*, 1887, (ICC Documents, p. 81); J.B. Lash, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, September 5, 1888, Canada, Department of Indian Affairs, *Annual Report*, 1888, (ICC Documents, pp. 94-95); J.B. Lash, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, August 27, 1889, Canada, Department of Indian Affairs, *Annual Report*, 1889, (ICC Documents, p. 103).

[56] J.B. Lash, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, August 27, 1889, Canada, Department of Indian Affairs, *Annual Report*, 1889, (ICC Documents, pp. 103-04).

[57] J.B. Lash, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, September 1, 1890, Canada, Department of Indian Affairs, *Annual Report*, 1890, (ICC Documents, p. 113).

> The stock is in fine condition, and the increase most encouraging.
>
> The crops this season are turning out splendidly, and the Indians are contented and happy with the prospect of enjoying the fruit of their labour.[58]

As their operations flourished, the Bands became increasingly self-reliant, as Lash remarked in 1891:

> The Indians of this agency are steadily advancing in civilization and becoming more independent every year, thereby reducing the assistance required from the Department. The returns from the harvest were very good, and some Indians are still using their own flour.
>
> Pasquah's Band were almost entirely self-supporting from October to April. During the winter they were kept busy selling firewood at Fort Qu'Appelle. Muscowpetung's and Piapot's Bands also supported themselves for several months, but they have not had the advantage of the sale of wood during the winter on account of the distance from their reserves to the towns.
>
> During the year we sold and delivered at Regina and other points five hundred tons of hay.[59]

The 1891 season yielded the best results Lash had seen during his tenure as Indian Agent, but his comments regarding 1892 were more subdued:

> The past year [1891] has been the most prosperous since the agency was opened and the Indians have practically supported themselves for the past eight months. The crops were excellent, so that in addition to supplying their own flour until the next harvest, they had a surplus of wheat for sale; this with oats, hay and wood sold furnished them cash sufficient to make a very comfortable living. . . .
>
> The Indians are becoming more independent and so long as they can find sale for their hay and wood, are quite willing to support themselves. . . .
>
> The stock herd has prospered, and in the coming year we will supply all the beef required within the agency, and work cattle to Indians commencing farming on their own account. . . .
>
> There has been an increase in the acreage, this year, under crop of two hundred acres. I regret to state the grain at Piapot's has been considerably damaged by a severe hail-storm. The crops on the other reserves are short in the straw, but otherwise looking fairly well.[60]

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[58] J.B. Lash, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, September 1, 1890, Canada, Department of Indian Affairs, *Annual Report*, 1890, (ICC Documents, p. 113).

[59] J.B. Lash, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, August 29, 1891, Canada, Department of Indian Affairs, *Annual Report*, 1891, (ICC Documents, p. 131).

[60] J.B. Lash, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, August 23, 1892, Canada, Department of Indian Affairs, *Annual Report*, 1892, (ICC Documents, pp. 153-54).

In 1893, drought conditions damaged crops in the Muscowpetung Agency but, by virtue of hay and wood production, which Lash referred to as "our great industries," the Indians continued to progress towards economic self-sufficiency:

> Regina takes the bulk of the hay, and Fort Qu'Appelle and the adjoining settlement the wood, in both cases the demand is not large enough, and when our contracts are filled, a few loads glut the market.[61]

Lash also noted that "[t]he number of individual Indians that go out working off the reserve is increasing."[62]

The following year, Lash wrote that "sales of hay and wood have increased, and during the time the Indians are engaged in this work they are entirely self-supporting."[63] Despite the demonstration during the 1894 season that Indian farming remained vulnerable to the weather and global events, the Bands were still able to rely on hay and wood production to sustain a relative degree of independence:

> The past year has been the most trying our Indians have experienced since settling on the reserves; the general depression the world over and total failure of all crops in this district through continued drought and excessive heat, cutting off all returns from farming operations, left the Indians entirely dependent on other sources to pass over the crisis. The hay and wood industries were utilized to the utmost, and the assistance we required from the department was very little.[64]

Senega root formed a lucrative alternative source of income for the western Bands, but Lash grew concerned about the effects its harvesting was having on more conventional farming operations:

> The Indians derived a large amount of money this summer from gathering seneca root; but, as this work takes them off the reserves for weeks at a time, and keeps up the old habit of roaming over the prairies, I am of the opinion the benefit is counter-

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[61] J.B. Lash, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, September 9, 1893, Canada, Department of Indian Affairs, *Annual Report*, 1893, (ICC Documents, p. 165).

[62] J.B. Lash, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, September 9, 1893, Canada, Department of Indian Affairs, *Annual Report*, 1893, (ICC Documents, p. 165).

[63] J.B. Lash, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, August 31, 1894, Canada, Department of Indian Affairs, *Annual Report*, 1893/94, (ICC Documents, p. 179).

[64] J.B. Lash, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, August 23, 1895, Canada, Department of Indian Affairs, *Annual Report*, 1894/95, (ICC Documents, p. 200).

> acted by their absence from the reserves, and consequently there is not the attention given to gardens, root crops and ploughing which should be given at that time.[65]

Still, Lash considered that the seeding in the spring of 1895 had been well done "and the prospect of a bountiful harvest is most excellent."[66]

With the change in agency reporting requirements in the mid-1890s, Lash and his successors as Indian agent focused their attention on reserve resources and Band occupations. Muscowpetung's reserve featured good farm land, valuable hay meadows, and supplies of firewood, although by 1899 Indian Agent John Mitchell reported that "[t]here is now very little timber worthy of the name left on the reserve, and in a few years the fuel problem will have to be faced."[67] In fact, Mitchell was forced to make an example of one settler caught trespassing to steal firewood from the reserves because, "as wood grows scarcer and more valuable, there is a tendency to do more stealing."[68] The listed occupations of Band members were selling hay and wood, farming, raising stock, working off the reserve, freighting, tanning, hauling hay and managing cattle for the agency farm, gathering senega root, trading, and hunting and fishing.

The main resources on the Pasqua reserve were firewood and fish, with the ravines leading into the valley reputed to contain large quantities of wood. The reserve also included farm land and hay meadows, although the hay supply was "nothing like the quantity cut on the two first mentioned reserves [Piapot and Muscowpetung]."[69] Still, there was sufficient hay to supply the Band's own stock, as long as the herd was maintained at a smaller size. The major Band vocations were mixed farming and selling firewood, supplemented by employment off the reserve, freighting, tanning, hunting and fishing, and gathering senega root and berries. Lash noted in 1897 that the Band built a "very good dam" of its own on the "brush land" to secure a supply of water, and that "[t]his was found very useful last season, as water in the neighbourhood was scarce."[70]

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[65] J.B. Lash, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, August 23, 1895, Canada, Department of Indian Affairs, *Annual Report*, 1894/95, (ICC Documents, pp. 200-01).

[66] J.B. Lash, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, August 23, 1895, Canada, Department of Indian Affairs, *Annual Report*, 1894/95, (ICC Documents, p. 200).

[67] John A. Mitchell, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, September 23, 1899, Canada, Department of Indian Affairs, *Annual Report*, 1898/99, (ICC Documents, p. 279).

[68] John A. Mitchell, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, September 23, 1899, Canada, Department of Indian Affairs, *Annual Report*, 1898/99, (ICC Documents, pp. 283-84).

[69] W.M. Graham, Inspector of Indian Agencies, to Frank Pedley, Deputy Superintendent General of Indian Affairs, August 1, 1905, Canada, Department of Indian Affairs, *Annual Report*, 1904/05, (ICC Documents, p. 320).

[70] J.B. Lash, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, August 25, 1897, Canada, Department of Indian Affairs, *Annual Report*, 1896/97, (ICC Documents, p. 226).

The Standing Buffalo reserve, proportionally smaller to begin with, featured little hay, nor was there a good supply in the vicinity. Moreover, Mitchell noted that "it is doubtful whether cultivated grasses can be grown successfully in the light soil," making it difficult to raise cattle.[71] To feed their herd, Band members obtained permits to cut hay on government lands.[72] William Graham, the Inspector of Indian Agencies, later commented that "[t]he soil is very light and unless there is a wet season grain-growing is not a success."[73] To make their living, the members of this Band worked extensively off the reserve, where they were highly regarded and much in demand. They also raised grain and root crops, hunted and fished, and sold firewood, although in later years their wood supply diminished and they were required to obtain their own supply from outside sources.

THE *NORTH-WEST IRRIGATION ACT* AND EARLY WATER DEVELOPMENTS

By 1894, the federal government had come to view the drought conditions and scarcity of water in the North-West Territories as an obstacle to development and settlement, and it began taking steps to deal with the problem. One legislative initiative was the implementation of the *North-West Irrigation Act*,[74] which vested in the Crown the property in, and the rights to use water in, the North-West Territories. The statute further provided that no future grant of land by the Crown was to vest in the grantee "any exclusive or other property or interest in or any exclusive right or privilege with respect to any lake, river, stream or other body of water, or in or with respect to the water contained or flowing therein, or the land forming the bed or shore thereof." Similarly, no riparian owner or other person acquired the right to divert water permanently, or use it exclusively, by duration of use or otherwise, except in accordance with the provisions of the Act, unless that right had already been acquired by some pre-existing agreement or undertaking. The key provision of the Act for the purposes of the present inquiry was section 7, which stated:

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[71] John A. Mitchell, Indian Agent, Muscowpetung Agency, to Superintendent General of Indian Affairs, September 23, 1899, Canada, Department of Indian Affairs, *Annual Report*, 1898/99, (ICC Documents, p. 282).

[72] R.L. Ashdown, Indian Agent, Assiniboia-Qu'Appelle Agency, to Superintendent General of Indian Affairs, August 25, 1904, Canada, Department of Indian Affairs, *Annual Report*, 1903/04, (ICC Documents, p. 312); W.M. Graham, Inspector of Indian Agencies, to Frank Pedley, Deputy Superintendent General of Indian Affairs, August 1, 1905, Canada, Department of Indian Affairs, *Annual Report*, 1904/05, (ICC Documents, p. 322). Ashdown described the reserve as being "deficient in hay."

[73] W.M. Graham, Inspector of Indian Agencies, to Frank Pedley, Deputy Superintendent General of Indian Affairs, August 1, 1905, Canada, Department of Indian Affairs, *Annual Report*, 1904/05) (ICC Documents, p. 321).

[74] *North-West Irrigation Act, 1894*, 57-58 Vict., c. 30.

> 7. Any person who holds water rights of a class similar to those which may be acquired under this Act, or who, with or without authority, has constructed or is operating works for the utilization of water, shall obtain a license or authorization under this Act within twelve months from the date of the passing of this Act.
>
> 2. If such license or authorization is obtained within the time limited, the exercise of such rights may thereafter be continued, and such works may be carried on under the provisions of this Act, *otherwise such rights or works, and all the interest of such person therein, shall without any demand or proceeding be absolutely forfeited to Her Majesty and may be disposed of or dealt with as the Governor in Council sees fit.*[75]

Section 8 stipulated that any water vested in the Crown could be acquired for domestic, irrigation, or other purposes on application in accordance with the Act. Applications were given priority, first, on the basis of use (with domestic uses given highest priority; irrigation, next; and "other purposes," lowest priority) and, second, on the basis of the date of the application being made.

Early efforts at water management were numerous but "haphazard":

> Although the Dominion Government did not establish a systematic plan for water control in this early period, local efforts to moderate seasonal changes were made under the *Northwest Irrigation Act*. These projects, however, were administered and overseen by succeeding government agencies; between 1877 and 1892 by the Dominion Government through the Lieut[enant]-Governor of the NWT, as an agent for the Department of the Interior, then by the Legislative Assembly of the Territorial Government of the NWT until 1897, then by the Federal Public Works Department until 1931, when water, as a natural resource, was transferred to the provinces under the *Natural Resources Transfer Agreement*. Some 196 individual or group projects such as wells, dams, and dugouts as well as spill off and drainage ditches had been constructed by the time the Department of Public Works recorded the number of waterworks in the Qu'Appelle Valley in 1898. The exception to this pattern of haphazard development was the original Craven Dam built in 1906 by the Federal Government. The dam was for irrigation purposes and flooded an extensive area upstream from the dam between Craven and Lumsden, including the Val[e]port Flats.[76]

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[75] *North-West Irrigation Act, 1894*, 57-58 Vict., c. 30, s. 7. Emphasis added. The 12-month period referred to in the first subsection of section 7 of the 1894 statute was later amended to require the acquisition of a licence before July 1, 1898: see *North-West Irrigation Act, 1898*, 61 Vict., c. 35, s. 7; *Irrigation Act*, RSC 1906, c. 61, s. 9; and *Irrigation Act*, RSC 1927, c. 104, s. 9.

[76] Kathleen FitzPatrick, Specific Claims West, Department of Indian Affairs and Northern Development, "General Historical Background to the PFRA and Water Development in the Qu'Appelle Valley," September 25, 1995, p. 4 (ICC Exhibit 28).

Another report described early water development efforts in these terms:

> The early water control projects were not designed for flood control. More often than not they were constructed during periods of drought by individuals whose main concern was the containment of surface runoff for domestic use during the critically dry months. In such cases, the flow of water downstream was completely curtailed until the small reservoirs were filled. This, of course, served to accentuate the moisture problem for those living downstream of the dam.
>
> At the other extreme, during periods of excessive rainfall the areas upstream of the dams would experience sustained high water levels while the lower reaches would suffer from uncontrolled overflow and occasional washouts causing flash flooding, erosion and sedimentation.[77]

The first project recorded by the Indian Affairs Branch as having the potential to affect Indian lands was a dam that Alphonse Besson proposed in 1891 to erect downstream of Round Lake so he could operate a grist mill. When Indian Agent McDonald met with Besson to review the proposal, he concluded that it would flood 40 acres of land on the Ochapowace reserve; in McDonald's opinion, however, Band members had never made use of this land and were unlikely to do so.

The proposal was submitted to the Deputy Superintendent General of Indian Affairs with a request for instructions as to "whether the Department will allow the Indians to be asked to give their consent to the erection of a dam, which will affect their Reserve to the extent estimated."[78] The Indian Commissioner replied that, "in a matter of such importance the opinion of an engineer as to the land that would be affected by the erection of the dam is absolutely necessary to determine the extent of damage that would be done to the Ochapowace Reserve No. 71, and the consequent compensation which should be required before such dam is allowed to be constructed."[79] Surveyor John Nelson, instructed to assess the dam, likened it to a large beaver dam, and believed that raising the water level would benefit the "scrubby river bottoms which may be flooded." He viewed the proposed grist mill as "a boon to the Indians in this part of the Reserve as they will have a mill at their door." He concluded that the Indians should not be entitled to any compensation.[80] However, Hayter Reed, the Commissioner of Indian Affairs, later reported that, although the Ochapowace Band had been prepared to consent to the flooding, the dam had in any event washed out and Besson had left the country.[81]

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[77] 116782 Canada Ltd., "Qu'Appelle Valley Indian Development Authority Land Claim," April 14, 1986, p. 15 (ICC Exhibit 5).

[78] A.E. Forget, Assistant Commissioner of Indian Affairs, to Deputy Superintendent General of Indian Affairs, August 8, 1891, National Archives of Canada (NA), RG 10, vol. 6613, file 6108-4 (ICC Documents, p. 125).

[79] Indian Commissioner, Manitoba and the North-West Territories, to A.E. Forget, Assistant Commissioner, August 17, 1891, NA, RG 10, vol. 6613, file 6108-4 (ICC Documents, pp. 129-30). Both Kathleen FitzPatrick, Specific Claims West, Department of Indian Affairs and Northern Development, in "General Historical Background to the PFRA and Water Development in the Qu'Appelle Valley," September 25, 1995, p. 5 (ICC Exhibit 28), and counsel for the QVIDA First Nations in his written submission at p. 18 suggest that the Indian Commissioner stated that "the consent of Ochapowace was absolutely necessary." We read the passage as saying that "the opinion of an engineer was absolutely necessary," and it was on the basis of this instruction that surveyor John C. Nelson attended the site to provide his expert opinion on the effects of the proposed project.

Six years later, in 1897, the impact of the *North-West Irrigation Act* became apparent. In response to a succession of dry years, two unauthorized dams had been constructed by the Department of Marine and Fisheries in the Qu'Appelle River at Fort Qu'Appelle and Katepwe because water levels had diminished to such an extent that the water had become "stagnant and offensive." The dams had the desired beneficial effects for residents of the valley as well as for fish stocks, but they also flooded reserve lands belonging to the Muscowpetung and Pasqua Bands. On receiving instructions to assess the damage caused by the dams, surveyor A.W. Ponton reported that the flooded lands were marshes that had become dry during the prolonged drought. Still, he suggested that steps might be taken to regulate the water levels, and thereby protect the reserve lands from flooding, without causing damage to other lands. He also noted that, if Indian Affairs chose to object to the flooding, it could make a formal complaint. Such an objection might lead to an order for the removal of the unauthorized structures pending compliance with the *North-West Irrigation Act*.[82]

A complaint was duly filed by Indian Agent Lash and forwarded by Indian Commissioner A.E. Forget to J.S. Dennis, Acting Chief Inspector of Surveys and Irrigation in the federal Department of Public Works, on April 30, 1897, with a request for an order that the illegal dams be removed.[83] Dennis travelled to the Qu'Appelle Valley from Calgary in August of that year to find that the dam at Katepwe had washed out with the spring runoff, resulting in low water levels and exposed banks above the dam site. He recommended that the dam be rebuilt, although he suggested that it be redesigned to permit greater control of water levels.[84] He disclaimed Public Works' responsibility for the project, asserting instead that "representations regarding its construction should be sent to the Deputy Minister of Dept. of Marine and Fisheries, Ottawa."[85]

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[80] John C. Nelson, DLS, to Hayter Reed, Commissioner, Indian Affairs, September 19, 1891, NA, RG 10, vol. 6613, file 6108-4 (ICC Documents, pp. 132-33).

[81] Hayter Reed, Commissioner of Indian Affairs, to Deputy Superintendent General of Indian Affairs, October 8, 1892, NA, RG 10, vol. 6613, file 6108-4 (ICC Documents, p. 155).

[82] A.W. Ponton, in charge of Indian Reserve Surveys, to Indian Commissioner, April 15, 1897, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, pp. 213-16).

[83] A.E. Forget, Indian Commissioner, to J.S. Dennis, [Acting] Chief Inspector of Surveys and Irrigation, Canada, Department of Public Works, April 30, 1897, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 217).

Although Dennis indicated that he also intended to inspect the dam at Fort Qu'Appelle, there is no evidence that he did so. The issue became academic, however, in light of complaints received from the Reverend J. Huggonard, principal of the Indian Industrial School at Qu'Appelle, concerning the unsanitary and offensive-smelling plant and animal remains left uncovered by the receding waters above the Katepwe dam.[86] Huggonard noted the impact of the large number of water control structures in the Qu'Appelle Valley:

> Compared with the large area draining into the Qu'Appelle Valley and the quantity of water it used to receive 10 or 20 years ago from the numerous creeks, very little now flows in, on account of the numerous dams on all the creeks and ravines, some of which are very deep and bank-back the water for miles, this is not including the large dams at Regina and Moose Jaw.
>
> Previous to the creation of these dams on tributaries in the Qu'Appelle, the lakes and rivers used to rise from two to four or five feet every season, no such rise has taken place since 1894 and last year our lake did not rise two inches above low water level of the previous year and then went down fully ten feet, leaving over one hundred feet of decaying vegetable and animal matter exposed in the bay in front of the school.[87]

In the months that followed there were discussions among officials of Indian Affairs, the Department of Public Works, the Department of Marine and Fisheries, and the territorial government about which department should undertake the work and whether an interim structure should be erected. Public Works assigned an engineer to report on the matter and, by July 1898, it had been decided that reconstruction of a "substantial structure" should commence soon.[88] It is interesting to note that, at this time, settlers in the valley below the dam were opposed to its being rebuilt "on the ground that it would take too long to fill the lakes, thereby preventing the water from running in the river and over-flowing their hay meadows which would be detrimental to their hay crops."[89]

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[84] J.S. Dennis, Acting Chief Inspector, Department of Public Works, to Secretary, Department of the Interior, August 27, 1897 (ICC Documents, pp. 228-29).

[85] J.S. Dennis, Acting Chief Inspector, Department of Public Works, to D.W. McDonald, MLA, Regina, November 17, 1897, NA, RG 10, vol. 7548, file 6114-1, part 1 (ICC Documents, p. 230A).

[86] Extract from *Annual Report* of Rev. J. Huggonard, Principal, Indian Industrial School, Qu'Appelle, December 9, 1897, NA, RG 10, vol. 7548, file 6114-1, part 1 (ICC Documents, p. 231A); Rev. J. Huggonard, Principal, Indian Industrial School, Qu'Appelle, to Indian Commissioner, December 11, 1897, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 232A); Rev. J. Huggonard, Principal, Indian Industrial School, Qu'Appelle, to Indian Commissioner, December 13, 1897 (ICC Documents, pp. 233A-34A).

[87] Rev. J. Huggonard, Principal, Indian Industrial School, Qu'Appelle, to Deputy Minister, Department of Marine and Fisheries, January 20, 1898, NA, RG 10, vol. 7548, file 6114-1, part 1 (ICC Documents, pp. 243A-44A). This document is difficult to read, and it is not clear whether Huggonard stated that the water had not risen since 1884 or 1894.

The record in this inquiry is strewn with evidence of other proposed projects which had the potential to affect reserve lands. In 1914, members of the Pasqua Band asked for financial support to assist them in erecting two dams so they would not have to haul water to their farm lands above the valley.[90] Authorization was granted, with the costs to be charged to the Band's interest account,[91] but no further evidence is available about the project. Later, in 1921, the Fort Qu'Appelle Board of Trade petitioned the federal government for a dam to raise the water level in the river near Fort Qu'Appelle to make it more suitable for motorboating. Indian Commissioner W.M. Graham raised the concern that building a dam would probably cover the hay meadows of the western Qu'Appelle Valley Bands,[92] but the matter was ultimately referred to the Department of Public Works, since the river at that time was considered to be ***navigable***,[93] contrary to later evidence in this inquiry.[94] There is also no further evidence regarding this proposal.

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[88] J.S. Dennis, Deputy Commissioner, Department of Public Works, to Secretary, Department of Indian Affairs, July 14, 1898 (ICC Documents, p. 260). In a letter dated August 30, 1898, Indian Commissioner A.E. Forget reported that, with grading done by members of the Pasqua reserve, "[a] larger dam is under construction and when finished will be of great benefit to the Reserve": A.E. Forget, Indian Commissioner, to Secretary, Department of Indian Affairs, August 30, 1898, NA, RG 10, vol. 10314, file 675/8-4-3-79 (ICC Documents, p. 268A). It is not clear whether these comments relate to reconstruction of the dam at Katepwe or improving the one upstream at Fort Qu'Appelle, but the latter seems more likely if, as reported, the dam affected the Pasqua reserve.

[89] Rev. J. Huggonard, Principal, Indian Industrial School, Qu'Appelle, to Deputy Minister, Department of Marine and Fisheries, January 20, 1898, NA, RG 10, vol. 7548, file 6114-1, part 1 (ICC Documents, p. 242A).

[90] K. Nichol, Indian Agent, Qu'Appelle Agency, to J.D. McLean, Secretary, Department of Indian Affairs, July 8, 1914, NA, RG 10, vol. 7584, file 6114-1, Part 1 (ICC Documents, p. 331).

[91] J.D. McLean, Secretary, Department of Indian Affairs, to K. Nichol, Indian Agent, Qu'Appelle Agency, July 14, 1914, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 332).

[92] W.M. Graham, Indian Commissioner, to Secretary, Department of Indian Affairs, March 4, 1921, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 333).

[93] E.F. Drake, Director, Reclamation Service, Department of the Interior, to Secretary, Department of Indian Affairs, April 26, 1921, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 339).

[94] On January 16, 1976, after investigating title to the bed of the Qu'Appelle River passing through the Muscowpetung reserve, G.A. Poupore advised A.H. Markuson:

> According to the Ministry of Transport the waters at the above site are not considered navigable within the meaning of the Navigable Waters Protection Act. The Marine Aids Division informed that the uses of the river passing through Reserves 80 and 80B would be the watering of livestocks [sic]and provide also for the spawning ground for the fishing game.

In 1922, the problem was again too much water, and requests were made to raise the level of the Craven Dam, upstream from the Piapot reserve, to contain the waters inundating the hay lands. Public Works noted that the existing dam, built in 1905, was in poor condition and leaking badly, so that steps to correct it would likely be expensive and perhaps a waste of time, since it might well wash away in any event. In the course of its response, Public Works also illustrated how containment of the Qu'Appelle River might operate as a double-edged sword:

> Up to recently the people who are now asking that the dam be raised complained that this very dam was holding back too much water and that their hay lands along the Qu'Appelle River as well as the cattle suffered owing to low or shortage of water. If this dam were raised 1,300 acres of expropriated land belonging to the Department of Public Works would be more or less permanently flooded. And undoubtedly another hay acreage would require to be expropriated between the lake and the Craven dam, in addition to flooding the Lumsden Valley on the Qu'Appelle River.
>
> It seems to me that during low water years those people below the dam would like to see the dam removed completely and during the high water years they would like to see it raised to suit their purpose, without any consideration being given to other properties above the dam. . . .
>
> The Craven Dam should be partly rebuilt and provisions made so that ~~the~~ elevation of the water could be controlled.[95]

In 1924 a proposal surfaced that would have resulted in the construction of ditches to enable flood waters to drain from the hay flats as required.[96] Although surveyor H.W. Fairchild was dispatched to take levels and determine

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See G.A. Poupore, Director, Lands and Membership, Department of Indian and Northern Affairs, to A.H. Markuson, Regional Supervisor of Lands, Saskatchewan Region, Department of Indian and Northern Affairs, January 16, 1976, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 1001). A year later, Markuson passed this information on to A.J. Gross, with the following additional comments:

> On reviewing the interpretations of navigable waters, we note that interpretations of his Honour Judge Whitfield in 1914 indicating rivers may be navigable though not such as will bear boats or barges for the accommodation of travellers. If they are sufficient for the transportation of property, e.g., for floating logs or timber [sic]. A navigable river is a public highway and anyone has a right to use it as such having regards to the rights of others. Provincial legislation cannot authorize interference with the right of navigation that such under Section 91 of the BNA Act being under the exclusive jurisdiction of Canada. The title to the bed of a non-tidal navigable river is presumed to be in the riparian owner (in this instance since the band owns the land on both sides of the river, this would apply).

See A.H. Markuson, Regional Supervisor of Lands, Saskatchewan Region, Department of Indian and Northern Affairs, to A.J. Gross, Acting Assistant Regional Director, Economic Development, Saskatchewan Region, Department of Indian and Northern Affairs, January 31, 1977, DIAND file E4320-06566 (ICC Documents, p. 1066).

[95] Department of Public Works, District Engineer's Office, "Excerpts from District Engineer's Report," September 29, 1922, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, pp. 349-50).

[96] W.M. Graham, Indian Commissioner, to Secretary, Department of Indian Affairs, July 25, 1924, NA, RG 10, vol. 6615, file 7114-2 (ICC Documents, pp. 357-58).

the feasibility of the ditches,[97] there is no evidence of what became of this project.

In summary, it appears that, to the end of the 1920s, there were major floods in 1852, 1904, and 1916, with "high water" or "moderate flooding" also recorded in 1858, 1882, 1892, 1902, 1917, 1922, 1923, 1925, and 1927.[98] There were no large floods for the 20-year period between 1882 and 1902,[99] as the reports of the Indian agents at that time attest. However, in addition to the many seasons of drought described by the agents during that period, there were more dry years in 1910, 1914, 1917, 1918, and 1919.[100]

CREATION OF THE PRAIRIE FARM REHABILITATION ADMINISTRATION

In a few short years, the excessive water that plagued farmers in the 1920s became the fond hope of the "Dirty Thirties" as, in a complete reversal of the weather cycle, the parched prairies endured year after year of relentless drought. Indian Commissioner William Graham pleaded with Indian Affairs Secretary A.F. MacKenzie to request the Department of Public Works to open the dam at Craven for a few days, since "[t]he river on the East side of the dam has nearly dried up and if something is not done there will be a shortage of water for cattle this winter."[101] MacKenzie complied, but his counterpart in Public Works, K. Desjardins, replied with the following report from the District Engineer:

> [T]he stoplogs in the dam have been removed since early in the spring. On the 20th instant the elevation of water above the dam was practically two feet below the bottom

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[97] A.F. MacKenzie, Acting Assistant Deputy and Secretary, Department of Indian Affairs, to H.W. Fairchild, September 2, 1924, NA, RG 10, vol. 6615, file 7114-2 (ICC Documents, p. 360).

[98] Department of Agriculture, Prairie Farm Rehabilitation Administration, "Hydrology Report #21: Floods and Flooding Problems in the Qu'Appelle Valley," May 1958, p. 11 (ICC Exhibit 15); Department of Agriculture, Prairie Farm Rehabilitation Administration, "Hydrology Report #24: Drought and Flood in the Qu'Appelle Watershed (Summary Report)," May 1958, pp. 22-23 and 47 (ICC Exhibit 15); Saskatchewan Water Resources Commission, Investigation and Planning Branch, Economics Division, "Qu'Appelle Flood Study, Appendix C: A Historical Review of Flooding in the Qu'Appelle River Basin 1852-1971," April 1972, p. 104 (ICC Exhibit 23). It should be noted that evidence of "high water" and "flood" years prior to 1904 is largely anecdotal since records were apparently not kept before that time.

[99] Department of Agriculture, Prairie Farm Rehabilitation Administration, "Hydrology Report #21: Floods and Flooding Problems in the Qu'Appelle Valley," May 1958, p. 11 (ICC Exhibit 15).

[100] Department of Agriculture, "Prairie Farm Rehabilitation Act: What It Means to the Prairie Provinces," October 1961, p. 4 (ICC Exhibit 17).

[101] W.M. Graham, Indian Commissioner, to A.F. MacKenzie, Secretary, Department of Indian Affairs, September 5, 1930, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 365).

> of the sluice-ways, or four feet below the top of the dam, so that it will be impossible to let any water down the Qu'Appelle river through the dam.[102]

The crisis had only begun. The Prairie provinces had assumed responsibility for natural resources under the terms of the *Natural Resources Transfer Agreements* of 1930, but the magnitude of the problems caused by drought and the "severely deflated market prices" associated with the worldwide economic depression soon overwhelmed them.[103] The gravity of the situation was captured in the following excerpt from an article by E.S. Archibald:

> During its period of development, prairie agriculture has suffered many set-backs, but none so severe as that which accompanied the eight-year period of drought between 1929 and 1938. Throughout that period, repeated crop failures arising from unprecedented conditions of drought and soil drifting have been experienced over an extensive area covering south-western Manitoba, southern Saskatchewan and south-eastern Alberta. The area affected coincided almost exactly with Palliser's "arid" triangle[104] and contains over one-half of the farms in the Prairie Provinces. Furthermore, this drought period occurred simultaneously with the worldwide economic depression which started in 1929. The combined effect of drought and depression was devastating. Within the territory most severely affected, the farm income from wheat, the principal crop, declined by an average of seventy per cent during the years 1930 to 1937 inclusive. In 1937, the worst year of drought, the average yield of wheat in Saskatchewan was only 2.6 bushels per acre as compared with a long time average of 15 bushels.

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[102] K. Desjardins, Secretary, Department of Public Works, to A.F. MacKenzie, Secretary, Department of Indian Affairs, September 29, 1930, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 368).

[103] 116782 Canada Ltd., "Qu'Appelle Valley Indian Development Authority Land Claim," April 14, 1986, p. 20 (ICC Exhibit 5).

[104] Archibald's article also discusses the early history of the area, including the "Palliser triangle":

> During the years 1857 to 1860, Captain John Palliser explored the territory between Lake Superior and the Rocky Mountains in the interests of the British Government, with a view to determining the possibilities for agricultural settlement. Palliser came to the conclusion that the south-central portion of this territory was unfit for agriculture by reason of arid climate and infertile soil. This "arid" area, covering roughly 100,000 square miles, constitutes the famous "Palliser triangle". . . . The same opinion was expressed in 1859 by Professor H.Y. Hind, who explored part of the same area for the Government of Canada. These opinions were based largely on the condition and distribution of native vegetation. Thus, towards the year 1860, the prospects for agricultural settlement in the southern parts of the Prairie Provinces did not appear very hopeful.
>
> Twenty years later, however, a much more optimistic appraisal of the Palliser triangle was made by Professor John Macoun, botanist to the Engineer-in-Chief of the Canadian Pacific Railway. Macoun reduced Palliser's "arid" area to some 20,000 square miles and described the remainder of the triangle as suitable for agriculture.
>
> The somewhat divergent views expressed by Palliser and Hind on the one hand, and by Macoun on the other, may be explained on the basis of cyclic variations in rainfall, the observations of Palliser and Hind being made during a dry cycle of years, and those of Macoun during a wet cycle.

See E.S. Archibald, "Prairie Farm Rehabilitation," in *Canadian Geographical Journal*, October 1940, p. 159 (ICC Exhibit 7).

> As a result of the foregoing conditions a very large number of farmers in the affected area suffered heavy losses and experienced hardship and even destitution. Many people abandoned their holdings to seek new homes in more favoured sections, the resulting internal migration assuming considerable magnitude. Much of the abandoned land, unprotected by crop or grass growth, became subject to soil drifting to the detriment of neighbouring occupied land. Shrinkage of income rendered many farmers incapable of dealing with the soil drifting menace, or even of continuing normal farming operations. In whole municipalities the capital value of the community farm enterprise declined to less than its mortgaged indebtedness. Large governmental expenditures for relief, and to enable farmers to continue operations, became necessary. Under such circumstances the economic structure of the region was subjected to severe strain, and social services were threatened with disruption.
>
> The nation-wide repercussion of the drought crisis led the Dominion Government to introduce various measures for the alleviation of distress and the reorganization of agricultural economy, in the affected region.[105]

One such measure was the passage of the *Prairie Farm Rehabilitation Act*[106] and the establishment of the Prairie Farm Rehabilitation Administration (PFRA) under the federal Minister of Agriculture in 1935. The Act was very short, its primary operative section providing for the creation of an advisory committee "to consider and advise the Minister as to the best methods to be adopted to secure the rehabilitation of the drought and soil drifting areas of the Provinces of Manitoba, Saskatchewan and Alberta and to develop and promote within those areas systems of farm practice, tree culture and water supply that will afford greater economic security."[107] The Act further provided for the appointment of "such temporary technical, professional and other officers and employees" as the Minister might require to carry out the objectives of the Act, and established a budget of $750,000 for the first year of the PFRA's operation and $1 million for each subsequent year of its initial five-year mandate.[108]

In 1937, the PFRA's jurisdiction was extended to include the development of systems of land use and land settlement in addition to the original terms of reference comprising farm practice, tree culture, and water supply. In addition, the $1 million ceiling on expenditures in the last three fiscal years of the PFRA's mandate was eliminated, with the amount for each year to be set in Parliament's annual appropriations.[109]

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[105] E.S. Archibald, "Prairie Farm Rehabilitation," in *Canadian Geographical Journal*, October 1940, pp. 160-61 (ICC Exhibit 7).

[106] *Prairie Farm Rehabilitation Act*, SC 1935, c. 23.

[107] *Prairie Farm Rehabilitation Act*, SC 1935, c. 23, s. 4.

[108] *Prairie Farm Rehabilitation Act*, SC 1935, c. 23, ss. 6 and 8.

[109] *An Act to amend the Prairie Farm Rehabilitation Act*, SC 1937, c. 14, ss. 2 and 4.

Two years later, the five-year limit on the PFRA's mandate was also eliminated. The Minister of Agriculture was further authorized to enter into agreements with any provincial or municipal government in the three Prairie provinces, or with "any person, firm, or corporation, with respect to the development, promotion, construction, operation and maintenance of any project or scheme undertaken ... or which may be deemed necessary or desirable for the conservation of water." In conjunction with this power, the amending legislation permitted the Minister to "purchase, lease or otherwise acquire ... any lands or premises" required or to "purchase or rent whatever machinery or equipment may be required" for any project or scheme.[110]

The Act was amended again in 1941. However, whereas previous amendments had extended and broadened the PFRA's mandate, the new provision narrowed its jurisdiction by requiring the Governor in Council to approve any project or scheme that would cost in excess of $5000.[111]

As PFRA District Engineer L.D. McMillan wrote in 1941:

> The object of the Act is to remedy the severe effects of drought and soil drifting in the drought area of Western Canada. Under the terms of the Act, measures are provided to assist farmers in the affected areas to reduce the effect of drought and soil drifting. This included assistance in the conservation of surface water supplies for household use, stockwatering and irrigation, re-grassing, tree planting and reclamation of lands damaged by soil drifting. Assistance was also provided under the Act to the Universities of the western provinces in continuing and extending soil surveys and for an economic survey of the province.
>
> In 1937 the Act was extended by amendment to provide for the establishment of community pastures in certain areas where the soil and climate have been found to be unsuited for grain growing.[112]

The PFRA supported small, community, and large water development projects. For small projects, it provided financial and engineering assistance to individual farmers to construct dugouts and small dams to conserve surface runoff for stockwatering and domestic use, and to develop small irrigation projects for the production of forage crops. In the first five years of the program, the PFRA received 31,089 applications for assistance on small-scale projects, of which it approved 19,897 and completed 14,222: 9945 dugouts, 3447 stockwatering dams, and 830 irrigation projects.[113]

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[110] *An Act to amend the Prairie Farm Rehabilitation Act*, SC 1939, c. 7, ss. 1 and 2.

[111] *An Act to amend the Prairie Farm Rehabilitation Act*, SC 1941, c. 25, s. 1.

[112] L.D. McMillan, District Engineer, PFRA, "Qu'Appelle River Development," February 24, 1941, PFRA file 928/7Q2, vol. 2 (ICC Documents, p. 441).

Community projects were usually built to develop secondary tributaries to serve the needs of the inhabitants of a particular area. They often involved the restoration and improvement of natural water bodies that tended to dry up during droughts, either by installing control works on them or by diverting drainage into them. Such projects were usually implemented through cooperative arrangements among the PFRA, the provincial government, and the local community, with the community or the local agricultural district generally responsible for operating the projects after their construction.[114]

Large water development projects consisted of "all those projects which have been fully constructed and paid for from the P.F.R.A. vote [such as] large stockwatering dams, irrigation and water supply projects." By March 31, 1940, 63 of these projects had been completed or were under development, "representing a total water storage capacity of more than 300,000 acre feet, and the development of new irrigation facilities serving over 100,000 acres of irrigable land."[115]

WATER DEVELOPMENT BY THE PFRA IN THE QU'APPELLE VALLEY

Requests for the construction of dams and other structures in the Qu'Appelle Valley to alleviate the drought conditions came quickly after the establishment of the PFRA. On February 8, 1935, Regina lawyer George S. Kennedy, acting on behalf of Leslie H. Hoskins of Craven and 25 other farmers in the valley, forwarded the following petition to Member of Parliament F.W. Turnbull for personal delivery to Hugh A. Stewart, the Minister of Public Works:

> We, the undersigned, farmers residing along the Qu'Appelle River Valley in the province of Saskatchewan, HEREBY HUMBLY PETITION the Government of Canada to construct a number of dams on the Qu'Appelle River for the purpose of flooding the hay land in the spring.
>
> For some five years these lands which formerly produced good crops of hay have been completely dried out and the farmers along this area have been dependent on the Government for fodder to see them through.
>
> WE, therefore, RESPECTFULLY REQUEST that the Govern[ment]construct a number of such dams for the purpose aforesaid, and we individually undertake to release

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[113] Department of Agriculture, "Report on Activities under the Prairie Farm Rehabilitation Act for the Fiscal Year ending March 31, 1940," PFRA, Annual Reports, 1939/40 (ICC Documents, pp. 418 and 422).

[114] Department of Agriculture, "Prairie Resources and PFRA," 1969 (ICC Exhibit 19, pp. 42-44).

[115] Department of Agriculture, "Report on Activities under the Prairie Farm Rehabilitation Act for the Fiscal Year ending March 31, 1940," PFRA, Annual Reports, 1939/40 (ICC Documents, p. 423).

> the Government from any claims for damages occasioned by the flooding of our lands as a result of the said dams.
>
> AND we hereby agree that in the event of the construction of the said dams we individually agree each for himself that we will assume full responsibility for any hay which we may have in the Valley on March 1st in each year, either in stacks or otherwise and hereby waive any claim to damages occasioned by the said dams and flooding of our said lands as a result thereof.[116]

Turnbull delivered the petition to Stewart with his own entreaty:

> These farmers who live along the valley are to some extent in the cattle business and to some extent produce hay for market. If the waters could be controlled it would help them very considerably.[117]

Noting that a statement had recently been made in the House of Commons by Minister of Agriculture Robert Weir about the creation of the PFRA and the development of works in drought areas, Stewart advised Kennedy that he was referring the petition to Weir.[118]

The Qu'Appelle Valley was just one possible area for large water development projects and, across the Prairie provinces, investigations began to assess the viability of many potential sites for the erection of water control structures. Comprehensive field investigations, including topographical surveys and soil investigations, were required, as well as tests to determine the foundations needed for the structures that would have to be built.[119]

In 1937, drought conditions reached their peak but, to the dismay of farmers along the Qu'Appelle, the preliminary investigations in their valley were not promising for water development:

> Reports received indicate that the most serious drought ever experienced in the area now prevails over a greater part of the open plains area in Saskatchewan and the east half of southern Alberta. By the end of May crops south of the Canadian Pacific main line in Saskatchewan and most of east-central Alberta were dried out beyond recovery and with only light scattered showers along with high prevailing temperatures throughout the month of June, crops generally are a total failure. It is expected many

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[116] George S. Kennedy, Secord & Kennedy, Barristers & Solicitors, to Minister of Public Works, February 8, 1935, enclosing Petition from "Leslie H. Hoskins, SE 24-20-21 W 2nd, Craven, and approximately 25 other farmers" to Minister of Public Works, undated, NA, RG 17, vol. 3281, file 559-13 (ICC Documents, pp. 371-72).

[117] F.W. Turnbull, MP, to Hugh A. Stewart, Minister of Public Works, February 11, 1935, NA, RG 17, vol. 3281, file 559-13 (ICC Documents, p. 373).

[118] Hugh A. Stewart, Minister of Public Works, to F.W. Turnbull, MP, February 14, 1935, NA, RG 17, vol. 3281, file 559-13 (ICC Documents, p. 374).

[119] Department of Agriculture, "Report on Activities under the Prairie Farm Rehabilitation Act for the Fiscal Year ending March 31, 1940," PFRA, Annual Reports, 1939/40 (ICC Documents, p. 423).

> districts will not ship even one car load of wheat, while the feed situation and water supply has become exceedingly desperate.
>
> This calamity after several years of a most serious drought condition in the area has greatly intensified the needs and demands for prairie farm rehabilitation work including water development in particular. . . .
>
> QU'APPELLE VALLEY
>
> . . . Generally speaking, development in the Qu'Appelle Valley is not too promising. In the first place, there is lack of unanimity among the individuals who would be affected and topographical conditions would make it very expensive if not impossible to irrigate by means of gravity from ditches. Pumping is probably the only means by which any amount of this land could be irrigated other than by naturally flooding large acreages periodically, but pumping is likely to prove expensive since the lift in projects so far inspected is from 25' to 35'. The intention, therefore, is not to continue with any more reconnaissance survey in the Qu'Appelle Valley this year particularly since drought conditions in other parts of the province are much more serious.[120]

Nevertheless, the PFRA continued its investigations, and by 1940 a major water development project encompassing the four Fishing Lakes as well as Crooked and Round Lakes was under active consideration. According to L.D. McMillan, the first priority was to restore the four Fishing Lakes (also known as the Qu'Appelle Lakes) to their normal levels:

> It has been pointed out by residents of the valley in the vicinity of the Qu'Appelle Lakes that due to the heavy decline in lake levels in recent years, the fishing industry has been seriously affected, the summer camping grounds made less attractive, and the valuable hay lands at the west end of Qu'Appelle [Pasqua] Lake, which in former years was [sic] quite productive, has [sic] become entirely non-productive due to the decline in lake levels in this area. Furthermore, at the west end of Qu'Appelle Lake there existed a natural breeding ground for ducks when the lake levels were normal and that to restore this area to its former useful purpose the Qu'Appelle Lake should be raised four feet. Also as the levels of lakes referred to above become lowered the water becomes stagnant.
>
> A point which I believe is worth consideration in the study of lake levels in the Qu'Appelle Valley is that there are literally thousands of springs along the valley bed, especially between Katepwe Lake and Crooked Lake, that in normal years when the lake levels were high, ran freely but as the lake levels recede a corresponding drop is noticed in spring flow. It is believed therefore that by increasing the volume of water in the Qu'Appelle Lakes that [sic] an additional underground pressure will be created and a better flow from springs obtained.

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[120] Prairie Farm Rehabilitation Administration, "Progress Report for Month ending June 30th, 1937, including Water Development and Farm Survey," June 30, 1937, NA, RG 17, vol. 3284, file 559-13-4(2) (ICC Documents, pp. 388 and 400).

> In order to improve the adverse conditions caused by low water levels in the lakes, and to store water for irrigation purposes lower down the valley, it would be necessary to build control structures at the outlet of each lake.[121]

Although detailed survey work had not yet been completed around Crooked Lake and Round Lake, it was believed that erecting control structures at the outlet of each lake would also bring water levels there back to "normal," for the benefit of hunting, and boating, and for irrigating downstream lands. The six control structures, plus a seventh on Buffalo Pound Lake, would create 105,150 acre feet of additional water storage capacity.[122]

Residents of the Qu'Appelle Valley continued to press for dams to be built. On June 1, 1940, H.M. Salter, Secretary of the Qu'Appelle Valley Associated Boards of Trade, advised PFRA Director George Spence that the following motion had been adopted by the Boards' executive:

> 2. That a Damn [sic] be built at the East End of Round Lake raising the water level in the lake 2½ feet.
>
> The purpose of this being to provide water storage so that it could be released in the fall to provide water to the farmers below the lake for stock purposes.[123]

A delegation met with Spence in the early summer of that year, and Spence agreed to have the land along the shores and to the east of Round Lake surveyed. When no immediate report was forthcoming, P.W. Tinline, Secretary of the Whitewood Board of Trade, followed up with Spence in October to determine whether the survey had been completed, "as we feel that this is one project that is very necessary for this end of the Qu'Appelle Valley."[124] The PFRA had not been idle, however:

> During the last two or three seasons survey parties have been at work in the Qu'Appelle Valley making a detailed survey of all the valley lands from the western end near the town of Eyebrow on down through Lumsden, Ft. Qu'Appelle and to the Crooked Lake area. Up to the present time a detailed survey of all the valley lands has been completed from Eyebrow to Crooked Lake, a distance of approximately 150

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[121] L.D. McMillan, District Engineer, PFRA, to J.I. Mutchler, Senior Survey Engineer, PFRA, January 25, 1940, PFRA file 928/7Q2, vol. 2 (ICC Documents, pp. 404-05).

[122] L.D. McMillan, District Engineer, PFRA, to J.I. Mutchler, Senior Survey Engineer, PFRA, January 25, 1940, PFRA file 928/7Q2, vol. 2 (ICC Documents, pp. 405-06).

[123] H.M. Salter, Secretary, Qu'Appelle Valley Associated Boards of Trade, to George Spence, Director of Rehabilitation, Department of Agriculture, June 1, 1940, PFRA file 928/7R1, vol. 1 (ICC Documents, p. 433).

[124] P.W. Tinline, Secretary, Whitewood Board of Trade, to George Spence, Director of Rehabilitation, Department of Agriculture, October 31, 1940, PFRA file 928/7R1, vol. 1 (ICC Documents, p. 438).

> miles, and since the valley is from a mile to a mile and a half wide our surveys have covered an area of over 140,000 acres of land. . . .
>
> In studying the information gained as a result of our field work to date there are three important questions which arise:
>
> 1. The drainage area and the average annual runoff of water in the Qu'Appelle River.
>
> 2. The location of possible reservoir sites where water might be stored for irrigation or other purposes and their capacities.
>
> 3. The location and acreage of lands that may be irrigated. . . .
>
> With regard to construction work completed so far we have the Buffalo Pound Lake dam recently completed at a cost of approximately $70,000.00; a control dam between Craven and Long Lake was also completed last season. At the present time there are also a large number of small irrigation schemes in operation along the valley between Buffalo Pound Lake and Ft. Qu'Appelle.
>
> In regard to future developments it is expected that the next construction work undertaken will be in the vicinity of the Fishing Lakes. Plans and estimates have already been prepared for the proposed dams at Sioux bridge [located between Pasqua and Echo Lakes] and Fort Qu'Appelle. It might be mentioned here that it would not be too much to expect that at some future date water may be brought from the Saskatchewan River into the Qu'Appelle Valley to supplement present valley supplies.[125]

Additional work was required in the area of Crooked and Round Lakes, but the PFRA was ready to proceed farther west at the Fishing Lakes.

THE ECHO LAKE DAM

As already noted, the PFRA originally intended to build dams on each of the four Fishing Lakes, and it was foreseen that the dam on Pasqua Lake would flood portions of the Pasqua and Muscowpetung reserves. Spence wrote to the Superintendent General of Indian Affairs to inform him of the likely damage and to seek approval of the project:

> [I]t is proposed to construct a dam in the vicinity of Sioux Bridge, which is located between Qu'Appelle and Echo Lakes, for the purpose of raising the water level in Qu'Appelle Lake to Elevation 1574.0, which is 5.8 feet above the elevation of this lake in August of 1939. This will extend the lake westward approximately 6½ miles beyond its present western boundary and will flood approximately 201 acres in the Pasqua

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[125] L.D. McMillan, District Engineer, PFRA, "Qu'Appelle River Development," February 24, 1941, PFRA file 928/7Q2, vol. 2 (ICC Documents, pp. 442-43).

> Indian Reserve, No. 79, and approximately 1103 acres in the Muscowpetung Reserve, No. 80.
>
> The purpose of raising this lake is to provide storage water for irrigation purposes and when the complete project has been developed the lake will be drawn down below f.s.l. [full supply level] from 2 to 3 feet during June and July, which will remove water from approximately 500 acres of land in the Muscowpetung Reserve and make this land available for the cutting of hay. The other 600 acres in this Reserve and the 200 acres in Pasqua Reserve will, however, be almost continuously under water except in years of extremely low flow when it will be necessary to lower the lake down to its present level. The fact, however, that water will be standing on this land more or less continuously will probably mean that Marsh Grass will substitute itself for the existing grasses. Marsh Grass is not of any particular value for hay.
>
> In consideration of the fact that this land is being unfavourably effected [sic], I believe we would be prepared to construct diversion works in the Qu'Appelle River bed in the western portion of Muscowpetung Reserve for the purpose of giving the hay flats in this area an annual flooding even in years of low flow in place of the intermittent flooding which they now get and which occurs only in years of high flow. This would have the effect of increasing the gross hay production on the Reserve considerably above its present level.
>
> I would also ask you to note that it will be necessary to construct a small dyke, approximately 6 feet high, on the north side of the present Sioux Bridge to a point near the N.E. corner of Section 20, Township 21, Range 14, West of the 2nd Meridian, which will be located on Standing Buffalo Reserve, No. 78. The land on which this dyke will be constructed is of no particular value and is not used at the present time for any purpose.
>
> I may say that we have had an opportunity of discussing these proposals with your Mr. Christianson, who is of the opinion that our proposals will be of benefit to the Indian Reserves affected.
>
> We should like very much to obtain the Flooding Rights on these land[s], if possible, in return for our undertaking to construct works in the western portion of Muscowpetung Reserve for the purpose of flood irrigating hay lands in this area as mentioned above, if this can be arranged.
>
> As we propose to commence the construction of this project as soon as possible it would be appreciated if you would give this matter your earliest consideration in order that any necessary negotiations may be completed with as little delay as possible.[126]

Interestingly, although a dam was being considered at the outlet of Echo Lake, it does not appear that this project was raised with Indian Affairs, nor does it appear that any potential damage to the Standing Buffalo reserve was foreseen.

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[126] George Spence, Director of Rehabilitation, Department of Agriculture, to Superintendent General of Indian Affairs, Department of Mines and Resources, May 16, 1941, DIAND file 675/8-4, vol. 2 (ICC Documents, pp. 462-63).

Harold McGill, Director of the Indian Affairs Branch (which was then within the federal Department of Mines and Resources), acknowledged to Spence that the Muscowpetung and Pasqua reserves would be "very considerably affected" by the dam at Pasqua Lake and noted that it would be necessary for Indian Affairs to give the proposed development careful consideration.[127] McGill's letter was followed by a letter from Charles Camsell, Deputy Minister of Mines and Resources, to G.S.H. Barton, his counterpart in the Department of Agriculture:

> It is obvious from an examination of the key plan which accompanied Mr. Spence's report, that substantial, if not quite serious, damage will be done to both of the Reserves and in the interests of these Indians this Department will, of course, expect payment of satisfactory compensation. Those portions of these two Reserves which it is now proposed to flood are the sources of substantial revenues to both of these Bands, and it is our view that the local situation should first be carefully examined for the purpose of ascertaining definitely the extent of the damage to which both will be subjected.[128]

Barton replied that, while Spence had been prepared to construct diversion works to ensure annual flooding in Muscowpetung's hay flats that would offset "any loss occasioned" by the proposal to raise Pasqua Lake, he was prepared to abide by the course of action suggested by Camsell and to provide the full cooperation of Spence and his staff.[129] He instructed Spence that no further action could be taken "until the Department of Mines and Resources has been advised by one of its own officers that the proposed works are actually in the best interests of the Indian bands concerned."[130]

In the meantime, McGill recognized that Indian Affairs did not have the technical expertise to assess the project, and on June 10, 1941, he solicited help from J.M. Wardle, Director of the Surveys and Engineering Branch of the Department of Mines and Resources, to consider the following questions:

> Pasqua Reserve
>
> 1. Possible loss of revenue from rentals, etc.

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127 Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, to George Spence, Director of Rehabilitation, Department of Agriculture, May 23, 1941, DIAND file 675/8-4, vol. 2 (ICC Documents, p. 464).

128 Charles Camsell, Deputy Minister, Department of Mines and Resources, to G.S.H. Barton, Deputy Minister, Department of Agriculture, May 29, 1941, DIAND file 675/8-4, vol. 2 (ICC Documents, p. 466).

129 G.S.H. Barton, Deputy Minister, Department of Agriculture, to Charles Camsell, Deputy Minister, Department of Mines and Resources, June 3, 1941, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 468).

130 G.S.H. Barton, Deputy Minister, Department of Agriculture, to George Spence, Director of Rehabilitation, Department of Agriculture, June 3, 1941, PFRA file 928/7Q1, vol. 1 (ICC Documents, p. 469).

> 2. Loss of revenue from flooding of marsh lands, with particular reference to Antipa Point and Leader's Point.
> 3. Estimated loss of revenue to Indians through employment as guides, etc., and from other incidental seasonal occupations.
>
> Muscowpetung Reserve
>
> 1. Estimate of damage to hay lands (600 acres reported producing 1,000 tons annually)[.]
> 2. Estimate of damage to marsh lands or shooting grounds and incidental employment of Indians, if any.
>
> General
>
> It is our understanding that these flooding operations will affect quite a number of buildings on one or both of these reserves, such buildings being now located close to the existing shore of Qu'Appelle Lake, and that considerable damage will also be done to lands presently occupied by members of these Bands, either for agriculture or other purposes.
>
> Compensating Benefits
>
> It has been reported that the raising of the level of Qu'Appelle Lake in the manner indicated will result in certain compensating benefits to the Indians of these reserves and the Director of Rehabilitation [Spence] has stated that he was prepared to construct diversion works which would ensure annual flooding of hay flats in the western portion of the Muscowpetung Reserve in order to offset any loss occasioned by the raising of the lake level. This phase of the situation should be very carefully examined in advance. . . .[131]

Just four days later, on June 14, 1941, having heard that the project might not proceed, McGill wrote to Wardle to withdraw until further notice his request for engineering assistance.[132] That same day, he also asked Spence for further information, adding that he did not want to incur the expense of sending an engineer to the Qu'Appelle Valley "until your plans are further advanced."[133] Word of the delay was received with disappointment by R.M. Pugh of the Fort Qu'Appelle Board of Trade,[134] to whom Spence wrote:

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[131] Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, to J.M. Wardle, Director, Surveys and Engineering Branch, Department of Mines and Resources, June 10, 1941, NA, RG 10, vol. 6514, file IND 15-1-159 (ICC Documents, pp. 471-72).

[132] Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, to J.M. Wardle, Director, Surveys and Engineering Branch, Department of Mines and Resources, June 14, 1941, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, pp. 474).

[133] Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, to George Spence, Director of Rehabilitation, Department of Agriculture, June 14, 1941, DIAND file 675/8-4, vol. 2 (ICC Documents, p. 475).

[134] R.M. Pugh, Secretary, Fort Qu'Appelle Board of Trade, to George Spence, Director of Rehabilitation, Department of Agriculture, July 7, 1941, PFRA file 928/7Q1, vol. 1 (ICC Documents, p. 479).

> After surveys had been completed it was found that some valuable farm property would be flooded. It was also found that large tracts of land in the Muscowpetung Indian Reserve and the Pasqua Indian Reserve would also be flooded. The Department of Indian Affairs at Ottawa has raised certain objections to the proposed development and wish to make a further investigation on their own behalf, and what the outcome will be we are unable to say.[135]

Within two weeks of McGill's letter of June 14, 1941, however, Spence had met with Minister of Agriculture James G. Gardiner, who advised that Indian Affairs should instruct its engineer to proceed to the Qu'Appelle Valley. Nevertheless, Spence assured McGill that "[n]othing will be done in the way of letting contracts until we get the matter satisfactorily settled between your department and our own."[136] McGill immediately reissued his request to Wardle to have an engineer meet with Spence and other PFRA staff to review the plans and location of the proposed project.[137]

When McGill had not replied by July 15, 1941, Spence wrote again, indicating that the PFRA had allotted a certain amount of money for work in the Qu'Appelle Valley and, pending the outcome of discussions between the two departments, was anxious to make a decision.[138] The next day, Controller V. Meek of the Department of Mines and Resources informed O.H. Hoover, the Department's Acting District Chief Engineer in the Dominion Water and Power Bureau in Calgary, that the engineering assistance requested by McGill had been authorized.[139] On July 18, 1941, Hoover advised Spence that Assistant Hydraulic Engineer P.A. Fetterly would visit Regina the following week to meet with representatives of the PFRA and to inspect the reserves to be flooded.[140]

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[135] George Spence, Director of Rehabilitation, Department of Agriculture, to R.M. Pugh, Secretary, Fort Qu'Appelle Board of Trade, July 9, 1941, PFRA file 928/7Q2, vol. 2 (ICC Documents, p. 481).

[136] George Spence, Director of Rehabilitation, Department of Agriculture, to Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, June 27, 1941, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 478).

[137] Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, to J.M. Wardle, Director, Surveys and Engineering Branch, Department of Mines and Resources, June 14, 1941, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 480).

[138] George Spence, Director of Rehabilitation, Department of Agriculture, to Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, July 15, 1941, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 482).

[139] V. Meek, Controller, Department of Mines and Resources, to O.H. Hoover, Acting District Chief Engineer, Dominion Water and Power Bureau, Department of Mines and Resources, July 16, 1941, NA, RG 10, vol. 6514, file IND 15-1-159 (ICC Documents, p. 483).

[140] O.H. Hoover, Acting District Chief Engineer, Dominion Water and Power Bureau, Department of Mines and Resources, to George Spence, Director of Rehabilitation, Department of Agriculture, July 18, 1941, PFRA file 928/7Q1, vol. 1 (ICC Documents, p. 485).

Within a week, Fetterly had completed his inspection and issued his report. As this report is of considerable importance in the present inquiry, its terms are set forth at some length:

> III. Findings
>
> (1) Pasqua Reserve
>
> The first proposed dam is at the lower end of Qu'Appelle [Pasqua] Lake, at Sioux Crossing, 6 miles west of Fort Qu'Appelle. The sectional maps indicate that the normal level of the Lake prior to 1923 was 1572.0 feet. It is 1569.0 at present. The proposal is to raise it to 1574.0 in the spring and lower it to 1572 in the summer. It will never go below 1572.0.
>
> The Pasqua Reserve, which lies south of the lake only, includes most of the open water of the lake together with a few hundred yards of its transition area from open water through rushes, etc., to potentially flooded bottom lands.
>
> The possible detrimentally affected areas in this Reserve are three in number.
>
> Three capes or points, shooting rights.
>
> Marginal road along the bottom of the steep hill, and about one foot above the present level of the lake, flooded.
>
> Fodder along the south side, inundated. . . .
>
> (c) Fodder
>
> Marsh grass extends immediately north of the beforementioned road for about two miles to a width of two hundred feet or so. This area is, of course at about present water level (1569). Some of it is now being cut and it will all be cut in time. The white people on the north side are cutting and stacking marsh hay. It is understood that this marsh grass, if cut at the right time and before frost, and properly cured, makes good fodder. It apparently yields from ½ to a ton, or even more, per acre. Even two feet will probably permanently cover it and it is to be remembered that the permanent low elevation will be 1572.
>
> . . . This flooding will be permanent.
>
> Incidentally, the Pasqua Indians are said to be resentful of the fact that they were not consulted by P.F.R.A. before surveys started, and are sure to vote against any change.
>
> (2) Muscowpetung Reserve
>
> Conditions on this Reserve are somewhat different from those on Pasqua Reserve. The marsh grass just enters Muscowpetung and gradually merges within a thousand feet into hay flats, which are subject to flooding as they are only a few inches above water level. . . . The area affected consists of 1103.5 acres. This includes all the area under 1574 contour. . . .
>
> The P.F.R.A. propose to carry out any diversion works necessary, either for irrigation purposes or for drainage of pools. However, their apparent intention is to hold the water at [15]74 until summer and then lower it to [15]72. This means that all land under the 1572 contour will be permanently flooded. Thus approximately 500 acres will be available for cutting of hay later in the summer (above [15]72 contour)

> while 600 acres will be, to all intents and purposes, permanently flooded. The accompanying topographical map indicates the levels of the different areas and a study of this data would indicate that it is difficult to understand how the 500 acres can be reclaimed even at 1572 level, unless dyked. This area is said to produce over 1½ tons per acre. Even at a ton per acre it would produce 500 tons.
>
> No buildings are affected on either Reserve.
>
> IV. Conclusions
>
> First it will be necessary to secure the promise of the P.F.R.A. to construct any diversion works necessary on the Muscowpetung Reserve to reclaim lands annually flooded so they will produce the usual crop of hay. This refers to the area flooded in the spring only. . . .
>
> (a) Pasqua Reserve
>
> Benefits - No benefits noticeable.
> Damages - Shooting rights, say 20%, or $50 capitalized, or $1,250.
> Marginal roads, say $400
> Fodder, 200 acres at $8, or $1600.
> This totals $3,250 damages.
>
> (b) Muscowpetung Reserve
>
> Benefits – Possible beneficial flooding of 500 acres of land, although it is difficult to understand that the benefits will be very large, since the soil is moist already and the crops appear to be about as healthy as can be, under present conditions.
>
> Damages - Removal entirely of 600 acres of presently good grass-producing land from the side of production to at least partial uselessness.
>
> 600 acres at $8 per acre damage, or $4,800.
>
> In the opinion of the writer the flooding of these lands for two or three months every year will gradually decrease the quality and quantity of grasses until because of lack of air for such long periods they will degenerate into mere rushes etc; and eventually disappear.
>
> It may be repeated that all the above remarks are the opinions of the writer, only, particularly the price per acre ($8) set as the value of the inundated lands. Obviously no inspecting engineer can do more than state his own views.[141]

The total compensation payable to the Muscowpetung and Pasqua Bands, in Fetterly's opinion, was $8050.

On receipt of this report, the Acting Director of Indian Affairs expressed his appreciation to Wardle for Fetterly's services: "The work appears to have been done with painstaking care and the report will be of value to us in arriving at a settlement with the P.F.R.A. people should they decide to proceed with the work."[142] The Acting Director then forwarded the report to Spence with the following comments:

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[141] P.A. Fetterly, Assistant Hydraulic Engineer, "Report on Indian Reserves in Qu'Appelle Valley," July 25, 1941, NA, RG 10, vol. 6514, file IND 15-1-159 (ICC Documents, pp. 487-91).

> Mr. Fetterly's method of arriving at the figures would appear to be fair and reasonable, and it is suggested that they form a satisfactory foundation of negotiation toward settlement should it be your intention to proceed. We should be glad to have a statement as to whether or not you intend to proceed with the works, and in case you do we would like to have any observations you care to make on the question of compensation to the bands affected.
>
> This Branch is assuming that you have all necessary powers of expropriation of privately owned lands in which case it would not appear to us that the consent of the Indian bands concerned would be necessary. Should you wish to proceed all arrangements in connection with damages or compensation to the Indians might be made through this office acting on their behalf.[143]

The PFRA's Senior Consulting Engineer, B. Russell, concurred that Fetterly's estimates appeared "suitable as a basis for settlement in the case of Indian lands," but he noted that rights-of-way were still to be negotiated on private lands. He added:

> The Acting Director of Indian Affairs appears to assume that because we have the necessary powers of expropriation of privately owned lands, we do not require the consent of the Indian Bands. If this is the case, we are in a position to proceed at any time using Mr. Fetterly's estimates as a basis for negotiations.[144]

Spence, too, was surprised by the free rein that the Acting Director's letter appeared to convey to the PFRA:

> It was my understanding that the consent of the Indian Bands was necessary before any works could be proceeded with which would affect the lake levels. If, however, as stated in the above letter, Indian lands can be expropriated in a similar manner to private lands, there would seem to be nothing to prevent us proceeding with the work, so far as Indian lands are concerned.[145]

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[142] Acting Director, Indian Affairs Branch, Department of Mines and Resources, to J.M. Wardle, Director, Surveys and Engineering Branch, Department of Mines and Resources, August 12, 1941, NA, RG 10, vol. 6514, file IND 15-1-159 (ICC Documents, p. 499).

[143] Acting Director, Indian Affairs Branch, Department of Mines and Resources, to George Spence, Director of Rehabilitation, Department of Agriculture, August 12, 1941 (ICC Documents, pp. 500-01).

[144] B. Russell, Senior Consulting Engineer, Department of Agriculture, to George Spence, Director of Rehabilitation, Department of Agriculture, undated, PFRA file 928/7Q1, vol. 1 (ICC Documents, p. 502).

[145] George Spence, Director of Rehabilitation, Department of Agriculture, to Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, August 18, 1941, DIAND file 675/8-4, vol. [illegible] (ICC Documents, p. 503).

After this exchange of correspondence, the Pasqua Lake project was temporarily deferred because of budget limitations and shortages of labour and building materials during the Second World War.[146] In the meantime, the PFRA turned its attention to planning the dams on Crooked Lake and Round Lake, as will be discussed below.

When the PFRA returned its focus to the western part of the valley a year later, its engineers proposed, for cost-cutting purposes, to eliminate the dam on Pasqua Lake for the time being and to erect only the dam on Echo Lake, to maintain the water level on both lakes at the same elevation.[147] On June 3, 1942, Spence sought Deputy Minister Barton's authorization to proceed, adding:

> It should be noted that construction of the dam need not necessarily be delayed until all negotiations for flooded area has [sic] been completed, as if it should become necessary the dam can be constructed and stoplogs left out of same till negotiations covering flooded area have been completed.[148]

Barton requested additional information about the scaled-down project,[149] and, in response, Spence wrote:

> Compensation for Indian lands amounting to $8,050 relates to the earlier proposal for two dams. However, the new proposal for a single dam will not appreciably affect flooded area on the Pasqua Indian Reserve and while it will reduce the area of flooded lands at full supply level on the Muscowpetung Reserve from 1100 acres to 728 acres it was our opinion that in order to have any damages paid to the Department of Indian Affairs it would be necessary to have an additional report made to them and this would probably delay the project beyond this year's construction season.
>
> The greatest reduction which could be anticipated in this connection would be a 50% reduction in the area removed from good grass production land which would result in a temporary saving of $2,400.00. As the dam at the east end of Qu'Appelle Lake will probably be constructed eventually, it would seem advisable to compensate the Department of Indian Affairs once and for all rather than make a partial settlement on the basis of a single dam at Echo Lake at the present time and later a further settlement when the second dam is constructed.

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[146] 116782 Canada Ltd., "Qu'Appelle Valley Indian Development Authority Land Claim," April 14, 1986, p. 36 (ICC Exhibit 5).

[147] J.I. Mutchler, Senior Survey Engineer, PFRA, to George Spence, Director of Rehabilitation, Department of Agriculture, June 3, 1942, PFRA file 928/7E4, vol. 1 (ICC Documents, p. 571).

[148] George Spence, Director of Rehabilitation, Department of Agriculture, to G.S.H. Barton, Deputy Minister, Department of Agriculture, June 3, 1942, PFRA file 928/7E4, vol. 1 (ICC Documents, p. 573).

[149] G.S.H. Barton, Deputy Minister, Department of Agriculture, to George Spence, Director of Rehabilitation, Department of Agriculture, June 16, 1942, PFRA file 928/7E4, vol. 1 (ICC Documents, p. 576).

> If you consider it advisable, however, we can arrange to have a re-inspection made of the Indian lands and a re-evaluation of these lands in the new proposal can be made.[150]

Spence also commented on the utility of the project and the benefits that it was likely to bestow on the affected Bands:

> The usefulness of a project pending formation of an irrigation district consists of maintaining sufficient water in storage from flood years to permit a continuous flow being kept up in the Qu'Appelle River during the summer and fall months when this river ordinarily becomes stagnant and this will considerably improve its value for stockwatering purposes. . . .
>
> It is our opinion that Indians depend to some degree for their livelihood on fish obtained from these lakes and the increased water levels will, of course, improve conditions for the propagation of fish. It should be noted that under conditions of extremely low water which have been prevalent during last years a large number of the fish contained in these lakes have died and, while this is not a primary reason for the construction of a dam by this Department, the fact is that the construction of a dam will incidentally remedy this condition and I believe this fact should be given some consideration.[151]

Eventually, the bid of contractor Mamczasz & Rollack of Prince Albert for the construction of the Echo Lake dam was approved by Order in Council dated September 3, 1942,[152] and in short order the dam was built. Fetterly's estimate of $8050 to compensate the Muscowpetung and Pasqua Bands for damage to their reserve lands was never paid, notwithstanding the apparent concurrence of the PFRA and Indian Affairs that the amount was reasonable. There is no evidence that the Bands authorized the project or were even consulted regarding it, nor is there evidence that the diversion works proposed by Spence and viewed by Fetterly as "necessary . . . to reclaim lands annually flooded so they will produce the usual crop of hay" were ever built. Moreover, the potential effects of the Echo Lake dam on Standing Buffalo's reserve do not appear to have troubled the collective consciousness of either the Department of Agriculture or the Department of Mines and Resources.

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[150] George Spence, Director of Rehabilitation, Department of Agriculture, to G.S.H. Barton, Deputy Minister, Department of Agriculture, June 29, 1942, PFRA file 928/7E4, vol. 1 (ICC Documents, p. 577).

[151] George Spence, Director of Rehabilitation, Department of Agriculture, to G.S.H. Barton, Deputy Minister, Department of Agriculture, June 29, 1942, PFRA file 928/7E4, vol. 1 (ICC Documents, pp. 577-78).

[152] Order in Council PC 7900, September 3, 1942, NA, RG 17, vol. 3294, file 559-13-74 (ICC Documents, p. 601).

THE DAMS AT CROOKED LAKE AND ROUND LAKE

While Fetterly was in Regina in July 1941, Spence made use of the opportunity to have him inspect the proposed sites of the dams to be erected at Crooked Lake and Round Lake. After receiving Fetterly's initial report dealing with the dam at Pasqua Lake, Spence suggested to McGill that Fetterly prepare a second report providing his estimate of the damage that would result from the dams in the lower Qu'Appelle Valley.[153] Spence provided maps outlining the areas to be affected, and on September 8, 1941, Fetterly was instructed to prepare an addendum to his earlier work.

Three days later, the report was completed:

> II. Crooked Lake.
>
> This lake lies in the bottom of Qu'Appelle Valley and immediately adjacent to Sakimay, Cowessess and Shesheep Reserves in Townships 18 and 19, Ranges 5 and 6, west of 2nd mer[idian]. A dam is proposed to be built on the eastern end. The normal water level up to 1923 seems to have been, according to the sectional maps, 1484. It is assumed that this is according to the same datum as that of P.F.R.A.
>
> The proposed land flooding will be on the Shesheep Reserve on the west end of the lake, while the dam will be on the Cowessess Reserve on the eastern end.
>
> (a) Flooded area
>
> The flooded area is on the western end, north of the river, and consequently on Shesheep Reserve. At present (summer of 1941) it is quite dry although the marginal lands are covered with rushes. The transition area is much less than in Qu'Appelle Lake, being only a few hundred feet in length. The whole area is only a foot or two above the present level of the lake. . . .
>
> The level of the lake in September 1939 was 1478.2. In July 1941 it had risen to 1480. The dam will raise it to 1482. At the time of inspection the potentially flooded area was roughly estimated at about 300 acres. The accompanying map shows 360 acres. An estimate of the area covered by rushes, between the open water and dry land, would be, say, 80 acres. The remainder, 280 acres, is on dry land which will be flooded to the 1482 contour as indicated on the map.
>
> Obviously no benefits are caused by the dam. The damages to Shesheep Reserve are as follows:-
>
> | | |
> |---|---|
> | 80 acres of rushes area at $3 per acre | $ 240 |
> | 280 acres of dry land at $8 per acre | 2,240 |
> | Total damages | $2,480 |
>
> The area covered by rushes is included because under natural conditions the water might recede to such an extent as to render it arable to some extent.

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[153] George Spence, Director of Rehabilitation, Department of Agriculture, to Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, August 18, 1941, DIAND file 675/8-4, vol. [illegible] (ICC Documents, p. 503).

> (b) Dam
>
> The dam will be located on the Cowessess Reserve and, together with the borrow pit will occupy 3 acres. Damages would be 3 acres at $10 per acre, or $30. . . .
>
> III. Round Lake.
>
> This lake lies to the north of Ochapowace Reserve, in township 18, ranges 3 and 4, west of 2nd mer[idian].
>
> According to the sectional maps the normal elevation of the lake up to 1923 was 1454 feet above sea level. The present W. L. [water level] is 1448.4. A dam now exists at the lower or eastern end of the lake which raises the water one foot. Evidently, this dam is a private local enterprise. Last year the elevation was probably 1447.4. This lake can be raised by P.F.R.A. dam to 1451. The land affected, which lies between the river (which flows to the north-east at this point) and the open water of the lake is principally covered with rushes and consists of about 40 acres. An arbitrary value of $120 might be placed on this area. The area contiguous to the dam affected consists of one acre. This is higher than the flats and might be valued at $10, or a total of $130 damages.[154]

Fetterly's estimated damages totalled $2640, although he was uncertain about the damages that might be caused to summer resort buildings in the vicinity of Grenfel Beach that were situated just above the lake's proposed full supply level. Wardle forwarded the completed addendum to McGill on September 18, 1941.[155]

In the meantime, apparently buoyed by the advice of the Acting Director of Indian Affairs that, assuming the PFRA had powers of expropriation, the consent of affected Bands would not be required, the PFRA obtained bids for construction of the dams at Crooked and Round Lakes. On October 8, 1941, Phil South of Regina was awarded the contract by Order in Council PC 7764.[156] Construction commenced that fall, to the consternation of M. Christianson, the General Superintendent of Indian Agencies:

> I wish to bring to your attention that during my recent visit to the Crooked Lake Agency I was informed that the P.F.R.A. were building two dams, one near the Round Lake Indian Residential School and the other near the Crooked Lake Indian Residential School. I asked Mr. Kerley [the Indian agent] if they had permission from our

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[154] P.A. Fetterly, Assistant Hydraulic Engineer, "Addendum to Report on Indian Reserves in Qu'Appelle Valley, Crooked Lake and Round Lake," September 11, 1941, NA, RG 10, vol. 6514, file IND 15-1-159 (ICC Documents, pp. 512-15).

[155] J.M. Wardle, Director, Surveys and Engineering Branch, Department of Mines and Resources, to Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, September 18, 1941, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 519).

[156] Order in Council PC 7764, October 8, 1941, NA, RG 2, Series 1 (ICC Documents, p. 522).

> Department to build these dams and he informed me that as far as he knew they did not have any authority.
>
> Consequently I went over to the headquarters of the P.F.R.A. here in Regina and the following is the information obtained from there. One site, I think, covers only about one acre of Indian Reserve and the other 2 acres. Very little land will be flooded at Round Lake but considerable acreage will be flooded on the Shesheep Reserve and at Sakimay. The P.F.R.A. know, of course, that they should have had permission from our Department before building the dams and they are now writing. I presume you will receive a letter from them in the course of the next few days.[157]

As Christianson had predicted, Spence wrote to McGill within a week:

> I am enclosing herewith for your information prints of plans showing proposed development work to be carried out by this Department in connection with increasing the storage capacity of Crooked and Round Lakes in the Qu'Appelle River Valley.
>
> You will note from the plan showing the development of Crooked Lake that an area of approximately three acres will be required for dam site and borrow pits on the Cowessess Reserve, No. 73, and I wish to advise you that construction work on this project is at present under way. As soon as required legal survey has been completed we shall be in a position to file plan in the Land Titles Office and make an offer for this area through your Department.
>
> In the meantime you will note that when the lake is raised to its new full supply level, which may not occur for two or three years, that an area of approximately 360 acres will be flooded on Shesheep Reserve No. 74A, and an area of approximately 70 acres will be flooded on Sakimay Reserve, No. 74.
>
> Mr. P.A. Fetterley [sic] inspected these areas on his visit to the Qu'Appelle Valley in July of this year and will no doubt be in a position to place a valuation on these lands. If you consider it advisable for us to institute expropriation proceedings on the strength of Mr. Fetterley's [sic] valuation, we shall be glad to have this done.
>
> With regard to Round Lake development, you will know that there is an area required for the dam site on the Ochapowace Reserve, No. 71, amounting to one acre and that approximately 39½ acres on this same reserve will be flooded when the lake is raised to its new fall supply level. Mr. Fetterley [sic] also inspected this area and will no doubt be in a position to place a valuation on these lands also.
>
> I wish to advise you that while the dams themselves will be completed and ready for operation before next spring that we do not intend to raise the water levels to flood out the Indian lands until satisfactory negotiations have been completed to compensate them for any damages which may be incurred.[158]

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[157] M. Christianson, General Superintendent of Indian Agencies, to Secretary, Indian Affairs Branch, Department of Mines and Resources, November 28, 1941, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 523).

[158] George Spence, Director of Rehabilitation, Department of Agriculture, to Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, December 4, 1941, NA, RG 10, vol. 6514, file IND 15-1-159 (ICC Documents, pp. 524-25).

On receiving this letter, McGill considered that it raised concerns about flooding of the Ochapowace and Sakimay reserves that were not addressed in Fetterly's addendum report. He therefore asked Wardle to have Fetterly prepare a supplementary report,[159] and advised Spence accordingly.[160]

In Fetterly's defence, his immediate superior, Acting District Chief Engineer Hoover, noted on January 24, 1942, that Fetterly's inspection in July 1941 had been performed without the benefit of topographical maps, which had not yet been prepared, making it impossible for him to assess potential damages. He also suggested that Fetterly's area of 80 acres to be flooded on the Shesheep reserve corresponded with the 70-acre area mentioned in Spence's letter, although he was unsure because all the maps had been forwarded to Ottawa. In conclusion, Hoover recommended to Controller Meek that, if an immediate report on damages was necessary, Fetterly should promptly make a further visit to the Qu'Appelle Valley.[161]

Meek had the maps and he could see that the 70- and 80-acre areas were in fact in two discrete locations, but he concurred that Fetterly should return to make a further inspection.[162] The following day, Fetterly commenced a four-day tour with PFRA engineers, which concluded on January 30, 1942, and four days later he issued his second addendum report:

> III. Crooked Lake.
>
> (a) Flooded Hay Lands. . . .
>
> As will be noted by a study of the accompanying maps the area to be flooded at F.S.L. [full supply level] reaches contour 1482 at the north western end of the lake. The potential and actual hay land at the extreme west end covers an area of 290 acres (the original visual estimate of 280 acres was too small by 10 acres). In addition an area of 110 acres of rushes and much less valuable land lies between this 290 acres and the actual water. It is not likely that rushes will form on the new shore.
>
> On what might be called the north side of the Qu'Appelle River channel is a further area of potentially flooded land containing 70 acres. This area is considered to be of better potential value than the "rushes" area but less than the hay land.

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[159] Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, to J.M. Wardle, Director, Surveys and Engineering Branch, Department of Mines and Resources, December 12, 1941, NA, RG 10, vol. 6514, file IND 15-1-159 (ICC Documents, p. 528).

[160] Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, to George Spence, Director of Rehabilitation, Department of Agriculture, December 12, 1941, PFRA file 928/7R1, vol. 1 (ICC Documents, p. 529).

[161] O.H. Hoover, Acting District Chief Engineer, Dominion Water and Power Bureau, Department of Mines and Resources, to V. Meek, Controller, Dominion Water and Power Bureau, Department of Mines and Resources, January 24, 1942, NA, RG 10, vol. 6514, file IND 15-1-159 (ICC Documents, p. 532).

[162] V. Meek, Controller, Dominion Water and Power Bureau, Department of Mines and Resources, to O.H. Hoover, Acting District Chief Engineer, Dominion Water and Power Bureau, Department of Mines and Resources, January 26, 1942, NA, RG 10, vol. 6514, file IND 15-1-159 (ICC Documents, p. 533).

It is considered that the potential damages would be as follows:-

290 acres at $8.00 per acre	2320
110 acres at 3.00 per acre	330
70 acres at 5.00 per acre	350
3 acres Borrow Pit at $10	30
	3030. . . .

(d) Travel between Sakimay and Shesheep Reserves.

The Indians have been travelling between Sakimay and Shesheep Reserves for many years using fords at various points on the river immediately west of the lake and in the potentially flooded area. The level of the bottom of the river is about 1476 and the former summer water level in the river was about 1478 or thereabouts. The new F.S.L. will mean that at flood time an added four feet or thereabouts will exist at the fords. The nearest bridge, a steel one, on the east, lies at the "Mission" one half mile from the lake. The nearest bridge on the west is about 8 or 9 miles away. Either bridge means an added 20 mile drive for the Indians on their trips between the Reserves e.g. for fodder harvesting, when the lake is at F.S.L. which will designedly be existant only during the early part of the season.

It is therefore recommended that an inexpensive bridge be constructed with a floor above F.S.L. at some convenient point a short distance west of the flood line. This would be for the use of the Indians only and for vehicular traffic only.

As far as the latter item is concerned there exists an element of doubt in the mind of the writer as to the advisability of demanding a bridge. The evidence and obvious facts are all set forth in (d) but the distance across from bank to bank is upward of 100 [?] feet and even an inexpensive bridge could be constructed only at considerable cost. It would have to be at least seven feet high. However this matter can be settled by negotiation or consultation between the P.F.R.A. and Indian Affairs.

It is to be remembered, however, that the possible cost is the only question that causes the above mentioned doubt. The necessity seems to be apparent.

The Indians stated that they wished to have the flood water off their hay lands by July 15 but they must remember that the full compensation has been awarded and any hay they cut is added profit, as compensation is computed as if there were to be no further returns from hay-cutting. Ordinarily speaking, they probably will still be able to cut most or all of the hay by hay-cutting time as the water should all be removed much prior to that time.

IV Round Lake

The remarks found in "III Round Lake" of the Addendum Report of September 11, 1941 are applicable in this report except for the acreage. This has now been definitely found to be slightly different from the approximate area given in the former report, owing to the exact survey made since that time. The area affected consists of 27 acres and should be worth a total of $160 or about $6 per acre, average value. The area of one acre at the dam is valued at $10.00.

27 acres hay land and rushes	$160.00
1 acre at dam (Borrow pit)	10.00
Total.	$170.00[163]

Fetterly concluded that the total compensation should be $3,300 plus the construction of the inexpensive bridge to replace the natural fords that, before the flooding, permitted members of the Sakimay Band to access their lands on both sides of the river. He also reconsidered potential damages at the Grenfel Beach resort area, but found that, with the possible exception of one building that was still located above the full supply line, no buildings would have to be moved, and thus no damages were payable. His report was forwarded by Wardle to McGill on February 14, 1942.[164]

In reporting to Deputy Minister Camsell regarding Fetterly's investigations, McGill expressed concern about whether Indian Affairs could justify requesting the bridge at Sakimay. He recommended suggesting that Spence give "sympathetic consideration to the very great inconvenience which will, no doubt, be caused the Indians of the Sakimay and Shesheep Reserves by the raising of the waters at points where they have for many years been accustomed to crossing the river." McGill also proposed that "when payment of this compensation is made consent will be given to the proposed development."[165]

Before authorizing McGill to negotiate with Spence, Camsell's Chief Executive Assistant suggested that the local Indian agent be consulted to determine whether he considered Fetterly's estimate of damages to be fair and reasonable.[166] McGill put the question to both Christianson, the General Superintendent of Indian Agencies, and Agent W.J.D. Kerley, with the latter's attention directed in particular to the travel between the Sakimay and Shesheep reserves and the nature of the demand that should be put to the PFRA.[167] Christianson and Kerley expressed their satisfaction with Fetterly's valuation, and Kerley continued:

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[163] P.A. Fetterly, Assistant Hydraulic Engineer, "Addendum No. 2 to Report on Indian Reserves in Qu'Appelle Valley," February 3, 1942, NA, RG 10, vol. 6514, file IND 15-1-159 (ICC Documents, pp. 534-39).

[164] J.M. Wardle, Director, Surveys and Engineering Branch, Department of Mines and Resources, to Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, December 12, 1941, DIAND file 675/8-4, vol. 2 (ICC Documents, p. 543).

[165] Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, to Charles Camsell, Deputy Minister, Department of Mines and Resources, February 27, 1942, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 545).

[166] Chief Executive Assistant, Department of Mines and Resources, to Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, March 3, 1942, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 547).

> I also concur in that portion of his report referring to the bridge between Sakimay and Shesheep Reserves. I consider this is an absolute necessity, as even in dry years there would be at least four months of the year when the Indians would be unable to ford the river, and a longer period in wet years.
>
> I feel certain that the Indians would be well satisfied with the proposed compensation, but I feel equally certain that the Indians of Sakimay and Shesheep Reserves would raise a vigorous protest if the proposed bridge were not built and they were forced to travel twenty extra miles when they wished to cross.[168]

The Indians of Crooked Lake were not impressed with the project. They registered their complaints with Member of Parliament E.E. Perley, who in turn conveyed them to McGill:

> Their first complaint was that a dam was constructed last fall at the mouth of Crooked Lakes and raised the water three feet at the present time and is flooding their hay lands and it is doubtful if they will be able to cut any hay there this fall. They stated they had been offered a lump sum as compensation, but what they really want and think is their rights [sic] is, that they should receive an annual sum for damages which would be an amount sufficient to purchase hay for their cattle. They stated in their statement made to me that there was about three hundred and sixty acres of their hay land flooded on which they had been cutting annually from two hundred to three hundred tons. They also stated they have in the neighbourhood of three hundred head of cattle and a great many horses and any hay they put up over and above what they required for their own stock, had been sold off the Reserve and resulted in some little revenue. They also state they have to move their stock down in the valley on the flats in the winter time in order to have the water supply for their stock, as well as being near the hay.[169]

Notwithstanding these objections, McGill wrote to Spence, setting out the compensation estimated in Fetterly's second addendum report as well as the comments of both Fetterly and Kerley about the importance of the bridge at Sakimay. He then concluded:

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[167] Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, to W.J.D. Kerley, Indian Agent, Crooked Lake Agency, Indian Affairs Branch, Department of Mines and Resources, March 12, 1942, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 549A); Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, to M. Christianson, General Superintendent of Indian Agencies, Indian Affairs Branch, Department of Mines and Resources, March 14, 1942, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 550).

[168] W.J.D. Kerley, Indian Agent, Crooked Lake Agency, Indian Affairs Branch, Department of Mines and Resources, to Secretary, Indian Affairs Branch, Department of Mines and Resources, April 4, 1942, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 559).

[169] E.E. Perley, MP, to Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, May 11, 1942, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, pp. 562-63).

> The position of this Department with reference to your construction program already completed in the Qu'Appelle Valley is, therefore, that subject to the condition that your organization construct a bridge above F.S.L. at a convenient point a short distance west of the flood line so as to provide and maintain road communication between the Sakimay and Shesheep Indian Reserves we are prepared to accept the sum of $3,300.00 in satisfaction of the claim of the various bands of Indians for flood damage.[170]

In a separate letter to Perley to address the concerns of the Indians at Crooked Lake, McGill stated that "*this Department could not in the first instance prevent the construction of this dam*, but we were definitely interested in obtaining reasonable and satisfactory compensation for our Indians for any flooding damage which might result." He noted that Fetterly had undertaken thorough investigations of the damages that would be caused by the dams at Crooked and Round Lakes, and that his opinions, supported by Christianson and Kerley, had formed the basis of the compensation demanded from the Department of Agriculture.[171]

On June 6, 1942, PFRA District Engineer H.G. Riesen met with the Reverend V. de Varennes, the principal of the Cowessess Indian Residential School, about damages caused to school lands by the construction of the Crooked Lake dam. Following the meeting, Riesen informed Senior Survey Engineer Mutchler that the lands did not form part of the Cowessess reserve, and that the damages totalled $75, including $30 for damage to three acres of alfalfa caused by the development of a borrow pit, a further $30 for flooding three acres of hay land, and $15 for 60 pounds of alfalfa seed. De Varennes indicated that he would be satisfied with payment of $75, if the PFRA would also level the edges of the borrow pit developed in the school's alfalfa field.[172]

In a memorandum dated July 2, 1942, to Spence, Mutchler suggested that the school's claim should be reduced to $60 because the PFRA could obtain replacement seed, presumably at no charge, from the Experimental Farms Branch of the Department of Agriculture. He also noted that de Varennes and

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[170] Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, to George Spence, Director of Rehabilitation, Department of Agriculture, May 14, 1942, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 565).

[171] Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, to E.E. Perley, MP, May 20, 1942, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 569). Emphasis added.

[172] H.G. Riesen, District Engineer, PFRA, to J.I. Mutchler, Senior Survey Engineer, PFRA, June 16, 1942, PFRA file 928/7C19, vol. 1 (ICC Documents, p. 575).

Kerley had acknowledged that the three acres of school land claimed to be flooded were the same three acres referred to in Fetterly's report as lands flooded on the Cowessess reserve.[173] In a second memorandum of the same date to Spence, Mutchler suggested that the $3300 compensation proposed for the Cowessess, Sakimay, and Ochapowace Bands be reduced by $30 to reflect the claim for school lands. He further observed that Riesen and Kerley had agreed that the construction of a ford for approximately $750 would meet the requirements of Indian Affairs to provide a crossing to serve the Sakimay Band.[174]

Spence in turn wrote to McGill asking for withdrawal of the $30 claim for flooding of lands on the Cowessess reserve.[175] However, the Acting Director of the Indian Affairs Branch replied that the claim of the Cowessess Indian Residential School was unrelated to the damages estimated by Fetterly.[176] In the face of competing claims, the PFRA was faced with the dilemma of identifying the owner of the land on which the Crooked Lake dam and borrow pit were situated, and John Vallance, Superintendent of Water Development, appealed to de Varennes for evidence of title.[177]

In the meantime, Perley wrote again to McGill, seeking payment of the compensation due to the Indians of Crooked Lake. Although the PFRA's Riesen had earlier proposed to lower the water level on Crooked Lake "to enable the Indians to cut some hay at the west end of the lake, which land is now flooded,"[178] Perley noted that

> they have not received any compensation and . . . they have not been able to cut any hay sufficient to feed their three hundred head of cattle and around one hundred and fifty horses and will be in desperate circumstances this winter. They say that the Government has encouraged the raising of cattle and that this question should have your immediate attention. They complain that the agent doesn't seem to be anxious or to have proper interest in their affairs and that the problems set out above are not dealt

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[173] J.I. Mutchler, Senior Survey Engineer, PFRA, to George Spence, Director of Rehabilitation, Department of Agriculture, July 2, 1942, PFRA file 928/7C19, vol. 1 (ICC Documents, p. 579).

[174] J.I. Mutchler, Senior Survey Engineer, PFRA, to George Spence, Director of Rehabilitation, Department of Agriculture, July 2, 1942, PFRA file 928/7C19, vol. 1 (ICC Documents, p. 580).

[175] George Spence, Director of Rehabilitation, Department of Agriculture, to Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, July 29, 1942, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, pp. 587-88).

[176] Acting Director, Indian Affairs Branch, Department of Mines and Resources, to George Spence, Director of Rehabilitation, Department of Agriculture, August 25, 1942, PFRA file 928/7C19, vol. 1 (ICC Documents, p. 597).

[177] John Vallance, Superintendent of Water Development, Department of Agriculture, to Rev. V. de Varennes, Principal, Cowessess Indian Residential School, September 11, 1942, PFRA file 928/7C19, vol. 1 (ICC Documents, pp. 602-03).

[178] H.G. Riesen, District Engineer, PFRA, to J.I. Mutchler, Senior Survey Engineer, PFRA, August 5, 1942, PFRA file 928/7C19, vol. 1 (ICC Documents, p. 589).

> with in proper time. They think that the dam should be lowered to permit the draining of the hay and their cutting hay thereon.[179]

D.J. Allan, the Superintendent of Reserves and Trusts, replied to Perley on October 3, 1942, by reiterating the steps taken by Indian Affairs to quantify and secure compensation on behalf of the Bands. He added that "[w]e have taken advantage of the opportunity afforded by the receipt of your letter to again press Mr. Spence strongly for an immediate settlement of both the damage claim and their claim for the erection of the bridge above referred to."[180] McGill followed up the same day with a strongly worded letter to Spence, referencing Perley's letter and asking for the matter to be brought to an immediate conclusion.[181] On October 21, 1942, Spence referred the matter to his Deputy Minister, recommending that Barton proceed to deal with the damage and bridge claims and that he "consider that Rev. de Varennes is to make his claim to the Department of Indian Affairs and not this Department."[182]

By October 27, 1942, Deputy Minister Camsell of the Department of Mines and Resources was warning Barton that "a good deal of uneasiness and impatience is being exhibited by the bands concerned."[183] At the same time, de Varennes, noting that the PFRA had levelled the borrow pit and promised to supply seed, pleaded with McGill to agree that $60 in compensation should be payable to the Cowessess Indian Residential School "because we are the losers in this affair."[184]

Pressed for a decision, Barton asked Spence for further information and his recommendation. Spence replied:

> With reference to your memorandum of October 28th regarding the above I wish to advise you that the claim of the Cowessess Indian School for the flooding of 4 acres

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[179] E.E. Perley, MP, to Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, September 23, 1942, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 606).

[180] D.J. Allan, Superintendent, Reserves and Trusts, Indian Affairs Branch, Department of Mines and Resources, October 3, 1942, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 609).

[181] Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, to George Spence, Director of Rehabilitation, Department of Agriculture, October 3, 1942, PFRA file 928/7C19, vol. 1 (ICC Documents, p. 610).

[182] George Spence, Director of Rehabilitation, Department of Agriculture, to G.S.H. Barton, Deputy Minister, Department of Agriculture, October 21, 1942, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 619A).

[183] Charles Camsell, Deputy Minister, Department of Mines and Resources, to G.S.H. Barton, Deputy Minister, Department of Agriculture, October 27, 1942, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 621).

[184] Rev. V. de Varennes, Principal, Cowessess Indian Residential School, to Harold W. McGill, Director, Indian Affairs Branch, Department of Mines and Resources, November 2, 1942, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 623A).

> of hay land has been reduced to 3 acres and is the 3 acres referred to in Mr. Fetterley's [sic] report to the Department of Indian Affairs and the Director of Indian Affairs' letter to us of May 18th, 1942, and referred to as Cowessess Indian Reserve, No. 73, 3 acres at $10.00, etc.
>
> This land will be permanently flooded at f.s.l. of Crooked Lake. There is a part of the Indian School's claim which is not included in Mr. Fetterley's [sic] report or Dr. McGill's letter of May 18th and that is the loss of 5 tons of alfalfa hay on 3 acres of borrow pit immediately below the Crooked Lake Dam amounting to $30.00 in addition to 60 lbs. of alfalfa seed. I wish to advise you that the 60 lbs. of alfalfa seed has not yet been turned over to the School by the Experimental Farms Branch as this has been held pending final settlement of the claim. As the situation now stands therefore, $30.00 for payment for 3 acres of flooded land should be paid to the Department of Indian Affairs and by them to the Cowessess Indian School and is included in the total of $3,300.00 claimed. The loss of 5 tons of alfalfa, amounting to $30.00, had not occurred when Mr. Fetterley [sic] visited Crooked Lake and, therefore, could not be included in his report. This $30.00 should be added to the previous claim, making a total of $3,330.00 and be passed on by the Department of Indian Affairs to the Cowessess Indian School. This will make a total of $60.00 payable by the Department of Indian Affairs to the Cowessess Indian School and as soon as your approval has been received arrangements will be made for the delivery of 60 lbs. of alfalfa seed to this school.
>
> I should also like at this time to call your attention to the fact that it will be necessary to construct a bridge over the Qu'Appelle River between Sakimay and Shesheep Reserves before this claim will be entirely settled. An effort was made by us to substitute a ford for a bridge and while this was agreeable to officials of the Indian Department the Indians themselves were not agreeable to this substitution. Consequently, it will be necessary for us to construct a timber bridge over the river as part of next year's operations. We are not in a position to submit a definite estimate of cost of this bridge at the present time but as soon as plans of same have been prepared and approved by the Department of Highways cost estimate will be furnished to you for authorization. If it is necessary for you to have an estimate of the cost of the bridge at the present time I would recommend that an outside figure of $2,000.00 be used for this purpose. This is considerably in excess of the cost of the ford but as the Indians will not accept the ford there does not appear to be much which could be done except build the bridge.[185]

Spence's recommendation received approval by Order in Council on November 19, 1942, although the instrument itself makes no reference to the

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[185] George Spence, Director of Rehabilitation, Department of Agriculture, to G.S.H. Barton, Deputy Minister, Department of Agriculture, November 3, 1942, PFRA file 928/7C19, vol. 1 (ICC Documents, p. 624).

Sakimay bridge.[186] Nine days later, F.M. Schrader of Deputy Minister Barton's office forwarded a copy of the Order in Council to Spence with a request for a cheque requisition so that payment could be made.[187] When payment had still not been forthcoming by April 26, 1943, the Acting Deputy Minister of Mines and Resources wrote to his counterpart in Agriculture to inquire.[188] By May 14, 1943, $3330 had been paid to Indian Affairs to the credit of the Cowessess, Sakimay, and Ochapowace Bands and the Cowessess Indian Residential School.[189]

In February 1944, when the school had not yet received its share of the proceeds, Christianson implored the Department on the school's behalf to requisition a cheque for $60.[190] Philip Phelan, Chief of the Department's Training Division, replied that he did not see how Indian Affairs could justify paying the school more than $30.[191] After consulting with engineer Gordon McKenzie of the PFRA, Christianson explained how the Residential School was entitled to $30 for damage to its alfalfa crop and a further $30 for flooded hay land, and he noted that the PFRA's records showed both amounts as having been paid.[192] The question whether the flooded hay lands belonged to the school or the Cowessess Band had now landed in the lap of Indian Affairs, and Indian Agent Kerley was asked to resolve the matter.[193] He confirmed that the Residential School was entitled to $60,[194] and a cheque in that amount was forwarded to the principal on March 27, 1944.[195]

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[186] Order in Council PC 10476, November 19, 1942, NA, RG 2, Series 1 (ICC Documents, p. 628). However, a later PFRA report states: "In addition, by authority granted to PFRA January 18, 1943, Canada agreed to contract a bridge across the Qu'Appelle River between Crooked and Round Lakes, for the convenience of the Indians; the bridge to cost an estimated $3,000. Construction of the bridge took place during 1943." See Canada, Department of Regional Economic Expansion, Prairie Farm Rehabilitation Administration, Land Administration Division, "Report on Crooked and Round Lakes Projects in the Qu'Appelle Valley – Saskatchewan," October 1979 (ICC Exhibit 27, p. 24). It is not clear whether this report refers to the same bridge, since the Sakimay bridge would presumably have been built at the *west* end of Crooked Lake and not *between* Round and Crooked Lakes.

[187] F.M. Schrader, Deputy Minister's Office, Department of Agriculture, to George Spence, Director of Rehabilitation, Department of Agriculture, November 26, 1942, PFRA file 928/7C19, vol. 1 (ICC Documents, p. 629).

[188] Acting Deputy Minister, Department of Mines and Resources, to G.S.H. Barton, Deputy Minister, Department of Agriculture, April 26, 1943, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 636).

[189] Credit Memorandum, Department of Agriculture (Payer), on account of compensation for flooding Qu'Appelle River Irrigation Damages, May 14, 1943, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 638).

[190] M. Christianson, General Superintendent of Indian Agencies, Indian Affairs Branch, Department of Mines and Resources, to Indian Affairs Branch, Department of Mines and Resources, February 8, 1944, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 648).

[191] Philip Phelan, Chief, Training Division, Department of Mines and Resources, to M. Christianson, General Superintendent of Indian Agencies, Indian Affairs Branch, Department of Mines and Resources, February 17, 1944, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 649).

[192] M. Christianson, General Superintendent of Indian Agencies, Indian Affairs Branch, Department of Mines and Resources, to Indian Affairs Branch, Department of Mines and Resources, February 21, 1944, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 653).

[193] D.J. Allan, Superintendent, Reserves and Trusts, Indian Affairs Branch, Department of Mines and Resources, to W.J.D. Kerley, Indian Agent, Crooked Lake Agency, Indian Affairs Branch, Department of Mines and Resources, March 1, 1944, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 654).

At that point, the only remaining issue was title to the dam site for the Round Lake dam. R.F.B. Donald on behalf of the PFRA's Land Ownership Investigator wrote to D.J. Allan, the Superintendent of Reserves and Trusts:

> You will remember that we paid $3,300.00 in connection with the Indian lands which were affected by the construction of this dam and included in that was a small dam site. We would like to get title to the dam site in order to be in the position to register easements from other owners at the west end of the lake and it is necessary to have this in order that these easements may be registered directly against the other owners' lands as servient tenements.[196]

Spence prepared a briefing note for A.L. Stevenson in the office of the Deputy Minister of Agriculture, but Stevenson responded that he did not recall any correspondence in which Indian Affairs "promised to transfer land to us for dam site purposes."[197] In reply, Spence explained:

> Replying to your memorandum of June 7th, I have looked up Mr. Mutchler's letters to Dr. McGill and to Dr. Barton at the time a settlement was made for damage claims to the Indians for $3300.00 and while the dam site appears to have been obscured at the time the summit was made, it nevertheless was our intention to obtain title to the one acre required and on which the dam was constructed.
>
> I am attaching hereto copies of several letters dealing with the matter and I would refer you particularly to the second paragraph on the second page of our letter to Dr. McGill dated December 4th, 1941 wherein we stated that there is an area required for the dam site on the Ochapowace Reserve No. 71 amounting to one acre and that approximately 39½ acres on the same reserve would be flooded. According to our interpretation of the matter we expected the flooding rights to be paid for in the matter of damages but we expected also that the dam site on Round Lake would be transferred to us as is usual, and also the dam site on Crooked Lake belonging to the reservation would be transferred to us. The reason the matter is being brought up now is due to the fact that we need to own a piece of land so that we can tie in

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[194] W.J.D. Kerley, Indian Agent, Crooked Lake Agency, Indian Affairs Branch, Department of Mines and Resources, to Indian Affairs Branch, Department of Mines and Resources, March 18, 1944, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 655).

[195] D.J. Allan, Superintendent, Reserves and Trusts, Indian Affairs Branch, Department of Mines and Resources, to Principal, Cowessess Indian Residential School, March 27, 1944, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 657).

[196] R.F.B. Donald for Land Ownership Investigator, PFRA, Department of Agriculture, to D.J. Allan, Superintendent, Reserves and Trusts, Indian Affairs Branch, Department of Mines and Resources, May 27, 1944, PFRA file 928/7R1, vol. 4 (ICC Documents, p. 662).

[197] A.L. Stevenson, Deputy Minister's Office, Department of Agriculture, to George Spence, Director of Rehabilitation, Department of Agriculture, June 7, 1944, PFRA file 928/7R1, vol. 4 (ICC Documents, p. 664).

> easements that are necessary to be taken from farmers or cattlemen at the west end of these lakes. . . .
>
> There is no doubt that the acre which we required in order to build the dam has been fully paid for at the rate of $10.00 per acre as shown in the breakdown of the $3300.00. The land was simply rough, scrubby stuff at the end of the lake.
>
> If you could therefore take this matter up with the Indian Department and obtain the necessary Deed for the one acre and at the same time, the three acres at Crooked Lake, same would be appreciated.[198]

In due course, Deputy Minister Barton requested that Deputy Minister Camsell of Mines and Resources "take the necessary steps to have title to the two small areas in question transferred to this Department."[199] Camsell replied that, from the plans on hand in his Department, the area to be conveyed could not be properly described, and he asked that the engineers in the Department of Agriculture furnish sketches or certified legal descriptions of the property required for each dam site.[200]

Spence proposed that one way around the problem might be to register caveats rather than the easements themselves against farmers' titles, using the Crown's titles to the lands on which the dams stood as the dominant tenements.[201] However, since the dams were situated on reserve lands, Saskatchewan's Land Titles Office was unable to provide a legal description for the dominant tenement.[202] This prompted Donald to comment:

> We have considered Dr. Barton's letter again and we are advising Ottawa that as we have had some difficulty in connection with easements and alleged damage claims for further compensation owing to flood conditions, that [sic] the method we will follow from now on is one of taking title to lands affected by water. This, I think, will let us out of a lot of grief.[203]

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[198] George Spence, Director of Rehabilitation, Department of Agriculture, to A.L. Stevenson, Deputy Minister's Office, Department of Agriculture, July 7, 1944, PFRA file 928/7R1, vol. 2 (ICC Documents, pp. 665-66).

[199] G.S.H. Barton, Deputy Minister, Department of Agriculture, to Charles Camsell, Deputy Minister, Department of Mines and Resources, July 17, 1944, PFRA file 928/7R1, vol. 4 (ICC Documents, p. 668).

[200] Charles Camsell, Deputy Minister, Department of Mines and Resources, to G.S.H. Barton, Deputy Minister, Department of Agriculture, August 12, 1944, NA, RG 10, vol. 7584, file 6114-1, part 1 (ICC Documents, p. 670).

[201] George Spence, Director of Rehabilitation, Department of Agriculture, to A.L. Stevenson, Deputy Minister's Office, Department of Agriculture, August 16, 1944, PFRA file 928/7R1, vol. 4 (ICC Documents, p. 671).

[202] Registrar, Land Titles Office, Registration District of Moosomin, to Land Ownership Investigator, Department of Agriculture, August 17, 1944, PFRA file 928/7R1, vol. 2 (ICC Documents, p. 673).

[203] R.F.B. Donald for Land Ownership Investigator, PFRA, Department of Agriculture, to A.J. Reece, Agricultural Assistant, PFRA, Department of Agriculture, August 17, 1944, PFRA file 928/7R1, vol. 2 (ICC Documents, p. 674).

Spence made the same recommendation to Barton.[204]

Eventually, Stevenson met with lawyers in the Department of Justice to discuss Spence's proposal to protect easements using caveats:

> This morning I discussed the proposal contained in your memorandum with Mr. Olmsted and Mr. Driedger of the Department of Justice. They assure me that as far as registering the easement is concerned, it does not matter whether the land on which the dam has been constructed and which is to serve as the "dominant tenement" is under the control of the Department of Mines and Resources, as at present, or the Department of Agriculture. It still remains land which is the property of His Majesty the King in the right of Canada, and that is all that is necessary. Any transfer which may be effected from one Department to the other would be for administrative purposes only and would not affect the title. We will be glad to pursue this matter further if you think there is any additional information which you would like to have concerning it.
>
> As to the transfer of the lands in question from the Department of Mines and Resources to this Department, we are enclosing, for your information, a copy of an exchange of letters between Dr. Barton and the Deputy Minister of Mines and Resources. Perhaps you will not wish to proceed any further, in view of the opinion of the officers of the Department of Justice referred to above.[205]

In view of this memorandum and the opinion of the Department of Justice, title to the dam sites on Crooked and Round Lakes was not pursued further by the PFRA.

WATER CONTROL OPERATIONS TO 1970

After the construction of the dams in the Qu'Appelle Valley, they were used and operated for their intended purpose, which was primarily to store water for irrigation purposes. From time to time, when periodic flooding inundated farm lands in the valley, the PFRA received complaints and requests for compensation from farmers and Indians alike, but the responses typically attributed much of the blame to natural conditions. For example, on May 31, 1943, the PFRA's Superintendent of Water Development, John Vallance, provided the following answer to farmer Charles J. Kallio of Tantallon, Saskatchewan:

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[204] George Spence, Director of Rehabilitation, Department of Agriculture, to G.S.H. Barton, Deputy Minister, Department of Agriculture, August 17, 1944, PFRA file 928/7R1, vol. 2 (ICC Documents, p. 675).

[205] A.L. Stevenson, Deputy Minister's Office, Department of Agriculture, to George Spence, Director of Rehabilitation, Department of Agriculture, October 18, 1944, PFRA file 928/7R1, vol. 4 (ICC Documents, p. 692).

I have for acknowledgment your letter of May 26th in which you state your dissatisfaction with the way this Department has handled the control of water at Round and Crooked Lakes.

It is a little difficult for us to see how the flooding in the Qu'Appelle Valley this year was entirely due to any negligence of ours. These records would show that the flow of water in the Qu'Appelle Valley during the spring of 1943 was one of the highest on record and I am sure that if you have lived in this valley for any length of time you will recall floods which have occurred there in previous years before any dams or control works had been constructed at any point in the valley.

There is no doubt that if it were possible to leave the lakes empty in the fall a certain amount of water from the spring runoff could be stored in them in the spring. Unfortunately, no one can anticipate in the fall the amount of water which will flow down the Qu'Appelle Valley the following spring and as the purpose of these storage works is to store water from years of high runoff for use in years when there is very little flow in the Qu'Appelle River, the draining out of these lakes at any time before we were assured of an adequate supply of water in the spring would defeat this purpose.

It might be possible for us to let water out of these lakes early in the spring before the spring floods commenced, when we were sure that there would be sufficient water to refill them, but this is the only improvement that we believe could be made in the operation of these projects.

For your information I have to advise you that both Round and Crooked Lakes, as well as other lakes in the Qu'Appelle Valley, were filled far above their normal full supply level this spring and more flood water was placed in temporary storage in these lakes than could ever have been done without our structures, even though these lakes were supposedly full last fall. Round Lake was filled with an additional three feet of water over its level last fall and Crooked Lake had over four and one-half feet placed in it during the peak of spring runoff. If this had not been done floods in the lower portion of the river would have been even greater than they were. While it is possible that if Round and Crooked Lakes had been entirely empty some slight alleviation of flood conditions in the Qu'Appelle River below these lakes might have occurred, I should like to point out that flood control in the Qu'Appelle River is the secondary purpose of these reservoirs, their primary purpose being the storage of water for drought years. Consequently, as previously mentioned, it is not possible for us to empty these lakes until we can be sure that they will be filled again.

In view of the fact that we can prove to the satisfaction of any disinterested body that the operation of the control structures at Round and Crooked Lakes did nothing to cause additional flooding of lands above that which would have occurred normally under this spring's flood conditions, we do not believe that it would be possible to consider the purchase of low lying lands in the Qu'Appelle Valley which have undoubtedly been flooded in previous years of high runoff.

For your information we are fully aware of conditions as they were throughout the entire length of the Qu'Appelle Valley this spring as we were able to have this area photographed by the Royal Canadian Air Force at the peak of the flood flow. We cannot agree that the flood conditions occurring in the Qu'Appelle Valley this year were brought about by the "negligence, carelessness and misjudgment of those in

> charge of P.F.R.A. projects", as if necessary we can prove that any actions of officials of this Department eased the flood conditions in the Qu'Appelle Valley rather than making them worse.[206]

Similar complaints were made in subsequent years, although in some years the objection was that, rather than causing flooding, the dams were *preventing* lands from receiving sufficient supplies of water. In some cases, individuals actually took matters in their own hands rather than simply registering complaints. In early 1947, for example, when a fish lock on the Round Lake dam had frozen in place, a farmer by the name of John Soloshy chopped open the lock to release water and permit him to water his stock.[207] Similarly, in 1968, a member of the Piapot Band constructed a small earth-fill dam across the river to gain access to the Band's land on the other side and to prevent the flooding of Band haylands.[208]

In the mid-1950s, the Qu'Appelle Valley experienced a high precipitation cycle that led to several years of flooding, culminating in the massive inundation of 1955 and lesser, but still serious, flooding in 1954, 1956, and other years. Property damage was extensive, but the PFRA continued to deny its own responsibility:

> Flooding of the flat land in the Qu'Appelle Valley would have occurred in 1955 whether there were control structures in the valley or not, the Prairie Farm Rehabilitation Administration said in a report released for publication Saturday[, January 7, 1956].
>
> The report was prepared by D.W. Kirk of the P.F.R.A. staff and summarized the history of water control in the valley and particularly during the 1955 flood year.
>
> There have been some criticisms from those with property in the valley of the manner in which the excess water was handled.
>
> "It can be stated that the P.F.R.A. structures on Echo, Crooked and Round lakes had no effect on the damage which the floods caused this year," the report said. Reclamation of some of the areas may take several years.
>
> According to the statement, the flood climaxed a nine-year period beginning in 1946 during which there was above normal precipitation. Water levels throughout the drainage basin had gradually risen until in the fall of 1954 the land could no longer absorb further moisture and all the sloughs, pot-holes, and marshy areas were filled to over-flowing.

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[206] John Vallance, Superintendent of Water Development, PFRA, Department of Agriculture, to Charles J. Kallio, May 31, 1943, PFRA file 928/7R1, vol. 2 (ICC Documents, pp. 639-40).

[207] H.W. LaRocque, Agricultural Inspector, PFRA, Department of Agriculture, to George Spence, Director of Rehabilitation, Department of Agriculture, PFRA file 928/7R1, vol. 2 (ICC Documents, pp. 702-03).

[208] Allan R. Guy, Minister in Charge, Saskatchewan Water Resources Commission, to Jean Chrétien, Minister, Department of Indian Affairs and Northern Development, September 18, 1969, DIAND file 675/8-4, vol. 1 (ICC Documents, p. 758).

> The lake levels in the Qu'Appelle valley also rose steadily until by 1954 they had reached the highest record[ed] level since 1881.
>
> "Recognizing the imminent flood danger, P.F.R.A. undertook to drain the Qu'Appelle lakes as much as possible during the winter 1954-55 so that in the event of a heavy runoff in the spring of 1955 storage would be available in the lakes to assimilate some of the excess flood waters which might be expected," the report said.
>
> . . .
>
> "But the draining process was slowed down and limited by the capacity of the natural drainage channel which was a flat grade and torturous meanders."[209]

In the late 1950s, the flooding conditions spurred the Muscowpetung and Piapot Bands to pass Band Council Resolutions authorizing PFRA personnel to enter the reserves to study channelization and other means of expediting river flows. Entry was for survey purposes only and the PFRA was specifically precluded from works such as dredging or earth removal unless the Bands had been consulted, had been shown exactly what was required, and had given their consent.[210]

In 1960, the Piapot Band registered a complaint that "P.F.R.A. have flooded farm lands and hay lands without ever obtaining permission to do so," and asked to "be compensated or keep the water out off [sic] our Reserve."[211] It was the first of several such complaints by the Band. In an internal memorandum, M.G. Jutras, Superintendent of the File Hills-Qu'Appelle Indian Agency, acknowledged that channel clearing and irrigation work in the Lumsden area upstream from the Piapot reserve "contributes to flooding but I doubt that it is the cause as I understand that these conditions existed prior to the P.F.R.A. work."[212] Jutras maintained that the channelization work should have continued through the Piapot, Muscowpetung, and Pasqua reserves, but it is not entirely clear from the evidence before the Commission in the present inquiry whether the benefits of channelization would have outweighed its alleged drawbacks, such as increased erosion and sedimentation.

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[209] "P.F.R.A. Denies Onus for Flood Damage," Regina *Leader-Post*, January 7, 1956, PFRA file 928/7Q2, vol. 3 (ICC Documents, p. 715).

[210] N.J. McLeod, Superintendent, File Hills-Qu'Appelle Indian Agency, Indian Affairs Branch, Department of Citizenship and Immigration, to E.S. Jones, Regional Supervisor of Indian Agencies, Indian Affairs Branch, Department of Citizenship and Immigration, July 12, 1956, DIAND file 675/30-1, vol. 1 (ICC Documents, p. 720).

[211] Piapot Band, Petition to Indian Affairs Branch, Department of Citizenship and Immigration, August 14, 1960, DIAND file 675/8-4, vol. 1 (ICC Documents, p. 732).

[212] M.G. Jutras, Superintendent, File Hills-Qu'Appelle Indian Agency, Indian Affairs Branch, Department of Citizenship and Immigration, to Chief, Reserves and Trusts, Indian Affairs Branch, Department of Citizenship and Immigration, November 7, 1960, DIAND file 675/8-4, vol. 1 (ICC Documents, pp. 738-39).

In 1967, more flooding occurred and further complaints arose regarding the Echo Lake dam. H.A. Matthews, who replaced Jutras as Superintendent of the File Hills-Qu'Appelle Indian Agency, noted that the dam had been erected in response to drought conditions in the 1930s. He continued:

> Because of the drop in the lake level [in the 1930s], it was possible to harvest hay and pasture cattle on land which was normally covered with water. The P.F.R.A. conducted a survey and determined that the mean level of Echo and Pasqua Lakes was 1,571.5 feet above sea level. In 1942 a damn [sic] was constructed near Fort Qu'Appelle which has resulted in the lakes being maintained at this level.
>
> As a result of the lake being returned to its original level, some land, approximately 160 acres on the Pasqua Reserve which had been used for cutting hay and pasturing cattle, was covered with water. According to the P.F.R.A. engineers, the lake has been maintained at the level it was in the years prior to the drought period and at the level it was when the reserves were established.
>
> Flooding also occurs on the Muscowpetung and Piapot Reserves where water overflows the shallow river banks during the spring runoff and is trapped on the hay lands. P.F.R.A. officials have made an exhaustive study of this problem and have drawn up a comprehensive plan of dikes and channel improvements which is at present being studied by the Saskatchewan Provincial Government.[213]

By the late 1960s, the Province of Saskatchewan had begun to assume more responsibility for operating the control structures on the Qu'Appelle River. Although the earlier practice of lowering water levels in the fall to permit the Indians to "efficiently harvest their hay" had already been discontinued by the PFRA,[214] steps were taken to warn bands of anticipated flooding so they could remove machinery, grain, livestock, baled hay, and other property that might be damaged by high waters.[215]

In December 1969, J.J. LeVert, Indian Affairs' Regional Director for Saskatchewan, proposed the creation of a committee to "review ways and means of alleviating the [flooding] problem [on the Qu'Appelle River] as much as possible." LeVert suggested that the committee should include a member of the Piapot Band, the Superintendent of the File Hills-Qu'Appelle Indian Agency, the Department's Regional Senior Resource Development Officer, the Saskatchewan Water Resources Commission's Chief Engineer, and the PFRA's Regional Engineer.[216] Several meetings of this Flood Control Committee were in fact held, and at one such meeting Piapot Chief Rose Desjarlais raised the question of compensating bands for flooding. Federal and provincial committee members expressed no knowledge of compensation programs, but undertook to explore the possibility within their respective governments.[217] Assistant Deputy Minister J.B. Bergevin eventually responded that periodic flooding in the Qu'Appelle Valley was a problem of long standing, attributable primarily to natural causes, and that "no compensation has been paid to any land holder in the Valley because of flooding." He added that Saskatchewan's Department of Agriculture was undertaking steps to devise a system of water control measures to alleviate the conditions that had caused losses suffered in the past by the valley's inhabitants.[218]

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[213] H.A. Matthews, Superintendent, File Hills-Qu'Appelle Agency, Indian Affairs Branch, Department of Citizenship and Immigration, to H.T. Vergette, Head, Land Surveys and Titles Section, Indian Affairs Branch, Department of Citizenship and Immigration, July 27, 1967 (ICC Documents, p. 746).

[214] R.B. Godwin, Chief, Hydrology Division, PFRA, Department of Regional Economic Expansion, to G.T. Forsyth, Planning and Investigations Engineer, PFRA, Department of Regional Economic Expansion, April 30, 1975, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 972).

[215] See, for example, S.R. Blackwell, Assistant Director, Investigation and Planning Branch, Saskatchewan Water Resources Commission, to Resource Development Division, Indian Affairs Branch, Department of Indian Affairs and Northern Development, September 25, 1968, DIAND file 675/8-4, vol. 1 (ICC Documents, p. 750); N.J. Bowering, Acting Superintendent of Economic Development, Touchwood File Hills Qu'Appelle District, Department of Indian Affairs and Northern Development, to Chief Rose Desjarlais, Piapot Band, September 27, 1971, DIAND file 675/8-4, vol. 2 (ICC Documents, p. 837); N.J. Bowering, Junior Development Officer, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, to Stanley Pasqua, Chief, Pasqua Band, Patrick Fourhorns, Chief, Piapot Band, David Benjoe, Chief, Muscowpetung Band, and Alex Buffalo, Chief, Standing Buffalo Band, April 4, 1974, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 933A).

Meanwhile, as the process of transferring control of Qu'Appelle River operations from the federal government to the province continued, the question of title to the dam sites at Crooked and Round Lakes – and how title could be conveyed – resurfaced. C.J. Peterson, Head of Indian Affairs' Land Section, reported with regard to the Round Lake Dam:

> [I]t appears the Department of Indian Affairs was compensated for the Indian lands affected. However, the administration and control of this land was not transferred to PFRA and it might be desirable to request it.[219]

However, in a note to file, the PFRA's Assistant Regional Engineer, J.G.S. McMorine, commented that transferring title from Indian Affairs might be premature:

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216 J.J. LeVert, Regional Director, Saskatchewan, Department of Indian Affairs and Northern Development, to Chief Rose Desjarlais, Piapot Band, December 15, 1969, DIAND file 675/8-4, vol. 1 (ICC Documents, pp. 769-70).

217 Minutes, Flood Control Committee Meeting, February 11, 1970, PFRA file 928/7Q2, vol. 9 (ICC Documents, p. 773).

218 J.B. Bergevin, Assistant Deputy Minister (Indian and Eskimo Affairs), Department of Indian Affairs and Northern Development, to Chief Rose Desjarlais, Piapot Indian Band, August 19, 1970, DIAND file 675/8-4, vol. 2 (ICC Documents, p. 815).

219 C.J. Peterson, Head, Land Section, PFRA, Department of Regional Economic Expansion, to J.G.S. McMorine, Assistant Regional Engineer, PFRA, Department of Regional Economic Expansion, May 15, 1970, PFRA file 928/7R1, vol. 4 (ICC Documents, p. 792).

> Since I believe it is intended that ownership and control of all the Qu'Appelle Valley dams will be relinquished to the Saskatchewan Water Resources Commission in the fairly near future, it would seem pointless for P.F.R.A. finally (after 28 years) to arrange for the title to this land to be put in the name of this Department.
>
> It would seem reasonable that title should be obtained by the new owner at the time the transfer of the property is made. . . .
>
> (Since the Indian Affairs Branch has got along O.K. with the situation for 28 years, they shouldn't mind waiting another year or two.)[220]

Chief Engineer J.G. Watson conveyed this position to Indian Affairs on June 8, 1970.[221]

EFFECTS OF THE QU'APPELLE RIVER DAMS

Before continuing with the chronology leading up to the 1977 settlements between the PFRA and the Muscowpetung, Pasqua, and Standing Buffalo Bands, we will briefly document part of the impact of the dams at Echo, Crooked, and Round Lakes as described by members of the Bands and some of the experts who were retained to study the impact of those control structures.

In his oral submissions, counsel for the First Nations referred to the following excerpt from the testimony of Alex Wolfe of the Sakimay First Nation about conditions prior to the erection of the dams:

> And the people throughout this reserve here, and across the lake, they made their living by hauling wood, selling hay, and at this time of the year, selling the different kinds of berries that we find here, like the Saskatoons, the choke-cherries, the cranberries, and this sort of thing. The people here at that time did not receive cash for what they produced, it was in trade, like eggs, butter, cream, potatoes, maybe a quarter for the old man so he could buy tobacco, and that was the same there as it is -- as it was here. That's how our old people made a living in those years.[222]

Similarly, in a statutory declaration, George Ponicappo of Sakimay stated:

> Before the dams were built people made hay in the valley. Trees grew right up to the river. The people used to make pickets from the trees along the valley. They then

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[220] Note to file, J.G.S. McMorine, Assistant Regional Engineer, PFRA, Department of Regional Economic Expansion, May 25, 1970, PFRA file 928/7R1, vol. 4 (ICC Documents, p. 799).

[221] J.G. Watson, Chief Engineer, Western Region, Department of Regional Economic Expansion, to C.A. Artibise, Acting District Supervisor, Yorkton District, Department of Indian Affairs and Northern Development, June 8, 1970, DIAND file 673/30-4-71, vol. 1 (ICC Documents, pp. 802-03).

[222] ICC Transcript, September 18, 1996, pp. 55-56 (Alex Wolfe).

> could sell these pickets to make a living. We used to be able to hunt rabbits and fish. We used to trap muskrats. There were maple trees in the valley. People used to make maple syrup. There used to be a camping place where the bridge used to be.[223]

David Obey of the Pasqua First Nation observed:

> And along the valley, all the people, there was quite a few of the band members used to live along the valley, right from one end to the other, from the west to the east, and there was a lot of livestock at the time, as far as I could remember. There was a lot of cattle and horses here. It seemed like everybody on the reserve owned these animals, not just one person. They shared quite a bit with the things that they were doing. If there was any hard times they made deals on their own with the people from across the lakes. It wasn't only wood or anything like that, it was everything, it's too numerous for me to mention, but I could just mention a few things. Like there's wood, there's pickets, and there's hay, sometimes they'd trade for grain. Like it's just more or less of a survival deal they were going through.[224]

When asked whether people lived in the valley only at certain times of the year, he answered:

> They lived there year round. Most of them lived there year round. The ones that were farming had to come up top of the hills. See there was, like there was maybe just temporary buildings set up for themselves. Just like more or less of a shelter, just to survive, for the spring, right through the summer. But all the people lived along the valleys there because it was a better place for them. There was not only the trees and the grass, what I'm talking about, there was a lot of environment in there that the people used along that valley. See there was a lot of herbs in those days that they picked off the earth in order for the people to be healthy.[225]

Lawrence Stevenson of Pasqua stated:

> Now why I say this, or the way I express it is this, that in the winter months most of our Native people lived in the valley for water, for fish, for all kinds of ways to make their living. Now the hay meadows that we had in both this reserve and the Muscowpetung, there was quite an agreement with them, that they went on share basis either through work or through compensation of monies.[226]

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223 Statutory Declaration of George Ponicappo of Sakimay Indian Reserve No. 74, April 10, 1997, p. 1 (ICC Exhibit 35A).

224 ICC Transcript, October 2, 1996, p. 18 (David Obey).

225 ICC Transcript, October 2, 1996, pp. 24-25 (David Obey).

226 ICC Transcript, October 2, 1996, p. 71 (Lawrence Stevenson).

Earl Cappo of the Muscowpetung First Nation offered the following remarks regarding the impact of the Echo Lake dam on water quality and haying:

> But I went to school for seven years and I come out, and everything was so different, lots of water, no hay, no trees, nothing. Then I quit school when I was 15-and-a-half-year old, didn't go back to Lebret. And there I noticed all these things getting dry and no hay, nothing. So then I noticed that dam coming through there, I was wondering what is going on, there's no natural flow of water there, they were building a dam across there, cutting off all the corners and putting them straight through, and I don't know what is going on. And I asked my dad, I said, "What's going on dad?" Well, he said, "They're making a swimming pool for you boys to swim in," he says. Because we used to be in the river, and that water was clean and we were able to swim in there and do everything. In them days the river was nice and clear, but today it's all – I don't know what's in there, muck, I guess. So I remember we used to sell hay, even haul it into Regina with the horses, sell hay for exhibition and everything, our groceries. All of a sudden that went, nothing, no sales, nothing. So we really did live off the land on the reserve and everything was pretty good in them days. Now today everything is all dried out. We used to cut pickets along the river, everything, really. But now there's nothing at all there, can't do nothing with the water. So I don't really know. I miss those days though, it was nice.[227]

In short, the economies of the Qu'Appelle Valley First Nations before 1940 featured considerable reliance on activities and resources in the valley bottom, including native hay, timber, beaver, muskrat, deer, berries, maple sugar, and important cultural and medicinal herbs and vegetation such as sweetgrass and senega root. The water in the river system itself was also fundamental to the Bands' existence, not only for domestic purposes but also for fishing, stockwatering, and the natural irrigation it provided by means of seasonal flooding of low-lying lands. Lower water levels also permitted Band members to cross the river to access hay and other resources on both sides. Hay and water were particularly important to those individuals who raised cattle on the reserves, but several of the reserves "developed a strong attachment to economic, social and cultural activities based on the river habitat."[228] The valley provided more than mere economic sustenance: it represented a way of life.

The testimony of the elders speaks eloquently to the consequences of flooding and other factors on this way of life. Marie Kaye of the Sakimay First

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[227] ICC Transcript, October 3, 1996, pp. 42-43 (Earl Cappo).

[228] James C. MacPherson Consultants Ltd., "The Qu'Appelle Subsidiary Agreement: Bands' Perspectives," March 1984, p. 4-34 (ICC Exhibit 4).

Nation described the importance of the Qu'Appelle Valley to her as a child and the changes brought about by the flooding:

> There came a time when I remember my grandmother, we went to the river with my grandfather, and they wanted to catch fish. My grandmother, we brought these fish back, she cleaned them and she cut them in strips and she dried them. These fish went in a bag and they got hung out in the shed. The berries along the river were choke-cherries, Saskatoons, high-bush cranberries, and there was a little red berry that grew on grey trees, those were called buffalo berries, and there was black currants and there was gooseberries, also there were hazelnuts. These are things that we gathered along the river, not to mention the maple sugar trees which my grandmother and grandfather hauled sap from. They made maple sugar and they made maple syrup. All of these things are gone. After the flood water killed, drowned, you name it, whatever they gave the fancy name what happened to these trees. It hit us hard because out of our food, what we'd stored for the winter, a lot of the berries and the rest of the stuff were gone, we had to then travel to the top of the hill to go and pick these berries, which my grandmother always said didn't taste as good as the ones by the river.[229]

Henry Delorme spoke of the loss to the Cowessess First Nation, of which he is a member:

> Land is sacred to us Indian people. We get our medicine, maple syrup. Trapping was a way of life all along the rivers. The dam flooding caused the trees and plants to die, and the wild life to deteriorate. Under the treaty we received gathering places, which meant fishing lakes, haying, et cetera. . . . Land was flooded while I was in residential school. The whole land in the valley was a big lake. This was because of the dam on the east end of Round Lake. Similarly, the dam on the east of Crooked Lake caused flooding on Sakimay and Shesheep. I used to go there with my grandmother and visit our relations who were camped along the lake and river fishing and trapping. We had to move to higher ground due to rise of the water.[230]

Raymond Acoose of Sakimay testified:

> First of all, I guess before the dam was built our people used to cross the river, the west end of the lake. At that time the water was, say, two to four feet deep because you were able to cross that river with the wagons and team. And our people used to make hay down there. They made tons of hay. . . . [O]ur people used to live in that area. George Ponicapo's [sic] grandfather lived in that area year round. He had built a house there, I suppose maybe George told you some of his story about his grandfa-

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[229] ICC Transcript, September 18, 1996, p. 66 (Marie Kaye).
[230] ICC Transcript, September 18, 1996, p. 50 (Henry Delorme).

> ther. He had like cattle, he pastured them just across the river there, and our people used to live off that land down there. They sold hay, they sold pickets, and our old people even then used to have their ceremonies down there, like spiritual gatherings at times, you know. There was a lot of things that happened after the floods. After that dam was built there was less communicating with our own people across that river. We didn't get to see one another as often as we did before. Also, that some of the animals that they used to trap down there had disappeared. Like mink, beaver and muskrats, and also that some of the trees down there that what was there was drowned out. Some of the people from the south side used to come on the north side to chop wood, pickets. After the floods they couldn't do that, and some of our elders whenever they wanted to visit our people on the south side here, you know, it was just a short distance from them to cross the river, and they were on the south side, but after that they could no longer do that because they had to go quite a few miles around.[231]

Pasqua's Raymond Gordon commented on how flooding had forced people to leave the valley:

> I can't remember a way back in the '20s and the teens, but I can remember back in the '30s when that land was used. There wasn't hardly anybody living up here on this reservation [on the bench], everybody was found living in the valley. And a lot of these people here know that. The people lived in the valley because they fished down there and like Stanley was talking about, they fished, the fish was good; today you can't eat that fish. And in the hills there was rabbits there was deers. They made a good living down in that place. And I believe Lawrence Stevenson can verify that, there was nobody living, hardly anybody, up here, they were all in the valley.
>
> And since they flooded that land and since they did this, you don't see anybody down there now because you can't eat that fish. The ducks or whatever, the natural habitat, you don't find it around there any more.[232]

Susan Yuzicappi of Standing Buffalo described the loss of haylands and trap lines:

> The only thing I remember is like camping at this marsh across Muskowpetung [sic]land [likely IR 80B]. But at that time nobody ever told me that it belonged to Muskowpetung [sic] or if it was Standing Buffalo. Nobody said anything, we just went and cut hay from 1935 to '39 we cut hay there. But we didn't go back after the flooding and all that, you know. But I know there was a lot of trapping lines on the valley before that, before the floods, because I know my husband used to come down and trap muskrats and that, like. But after the flood there was nothing. Mostly just

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[231] ICC Transcript, September 18, 1996, pp. 74-76 (Raymond Acoose).
[232] ICC Transcript, October 2, 1996, pp. 57-58 (Raymond Gordon).

> snakes, you walk by the river there, and the lake and that, there was lots of snakes after the flooding.[233]

Finally, George Ponicappo recounted the impact of the changes in the valley to his people:

> The flooding hurt all of the Sakimay Band. Our lands in the valley were flooded. The people used to have camps all over the valley in the summer. Today you cannot camp there. You cannot go there in a car in summer. There used to be a lot of ducks in the valley. The area that we used to hunt ducks is now flooded. The flooding affected the ability of the people on the reserve to make a living. The flooding hurt the farming, hunting and trapping. It destroyed cabins along the lake shore. The maple trees died and the maple syrup industry was destroyed. We had sweet grass and berries in the valley, today all that is gone. I went to the valley and I could not find one stick of sweet grass. The berries and the black currants are all gone. People used to sell them. We used roots to make medicine. Now the roots are all under water. . . .
>
> The flooding damaged the trees. The trees that are left are all dry and dead. In summer it is not green like it used to be.
>
> The valley was a gathering place. It was important to the social life on the reserve. People would gather together in the valley. The old people would sit and tell stories. They would pass on the stories. The old people would visit. There were camps where people would help each other make hay for the winter. People used to work together. There was a lot of cooperation. We would have celebrations in the valley. I remember that as a kid we had lots of fun along the river. We used to have races. There used to be sweats along the river. Now you cannot go to the area that these activities [took] place because it is flooded.
>
> The water itself is not as good as it used to be. We used to be able to drink the water. We used to swim in the water. Now you cannot drink the water. You cannot even swim in it because of the pollution. We used to be able to ice fish. Now we cannot fish. You used to be able to see the bottom. Not anymore.[234]

These comments by Band members are echoed in the studies undertaken by experts retained on behalf of the First Nations to study the damages caused by the PFRA dams in the Qu'Appelle Valley. Unfortunately, most of this evidence is some 15 years old because, for financial and other reasons, the flooding claim of the QVIDA First Nations has languished since the mid-1980s. However, certain aspects of these opinions appear to remain valid in light of current circumstances, and counsel for Canada did not challenge them.

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[233] ICC Transcript, April 4, 1997, pp. 16-17 (Susan Yuzicappi).

[234] Statutory Declaration of George Ponicappo of Sakimay Indian Reserve No. 74, April 10, 1997, pp. 1-2 (ICC Exhibit 35A).

D. Cameron and J.W. Hamm assessed the degree of soil degradation caused by the flooding, which they measured using soil salinity as the indicator:

> The degree of soil degradation due to flooding is directly related to the total salt content of the soil. In other words, we have used salinity as our indicator or "yardstick" to measure soil degradation due to flooding. The extent of soil degradation due to flooding is correlated with the extent, frequency, and duration of flooding. Over a period of time, land use tends to be a direct indicator of flooding characteristics. . . . Soil salinity tends to be most severe in the flood-prone lands. . . .
>
> According to our measured areas [for the four western Indian reserves in the Qu'Appelle Valley] there are a total of 847 acres (11% of the valley land area [of 7,765 acres]) that are permanently flooded due to raised lake levels. There are another 788 acres (10%) that are semi-permanently flooded and basically unusuable [sic] for agricultural production. Approximately 2,686 acres (34%) of the valley land is moderately to severely degraded due to frequent flooding. This land is generally used for pasture and hayland, although some of it appears to be abandoned because of the high salinity. . . .
>
> Approximately 293 acres (4%) of land that was flooded by the 1969 floods did not appear to have any evidence of degradation. In years of higher flood waters, this estimate would increase. A large portion (40%) of the land did not appear to be flooded and would generally not be affected by infrequent, short duration flooding.
>
> . . .
>
> The total valley land area occupied by the [four eastern] Reserves amounted to 6,506 acres of which 578 acres (9%) were classified as either permanently or semi-permanently flooded. According to our "yardstick" of soil degradation (which is the salinity index) there were only 451 acres (7%) of severely degraded soils which occur in Sakimay and Shesheep. Approximately, 1,560 acres of flooded land (24%) were moderately degraded while 911 acres (14%) were flooded, but showed local evidence of salinity degradation. A total of 3,006 acres (46%) were not flooded according to the 1969 flood lines.
>
> The western and eastern Reserves show some distinct differences in terms of flood degradation with the western Reserves showing more intense and more acres of degraded land. In the western Reserves 21% of the land base has been lost due to permanent or semi-permanent flooding while only 9% has been permanently lost in the eastern Reserves. Similarly, 24% of the land base was severely degraded in the western Reserves while only 7% was severely degraded in the eastern Reserves. It was estimated that 24% of the land base in the eastern Reserves was moderately degraded while 10% was moderately degraded in the western Reserves. In the Western Reserves about 45% of the land area did not appear to be affected by floods, while in the eastern Reserves about 60% of the land area was generally not affected by floods.[235]

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[235] D. Cameron, Normac Consultants, and J.W. Hamm, darWall Consultants, "A Study on the Degree of Soil Degradation Due to Flooding in the Eight (8) Indian Reservations in the Qu'Appelle Valley," November 1981, pp. 73-77 (ICC Exhibit 3, tab 5).

In summary, Cameron and Hamm viewed the affected areas of the valley as being more than just those permanently or semi-permanently flooded. However, it is important to recognize that factors other than the three dams at issue in these proceedings must also have been at work to cause these effects, as is apparent from the statistical data relating to salinity on the Piapot reserve. The evidence before this Commission is that flooding on the Piapot reserve, while perhaps due to other dams and conveyancing works along the Qu'Appelle River, cannot be caused by any of the dams on Echo, Crooked, or Round Lakes, since the full supply levels of these structures are at elevations below the lowest river banks on the Piapot reserve.

David R. M. Hatch was commissioned by QVIDA to study the impact on flora and fauna in the Qu'Appelle Valley caused by flooding on the reserves resulting from the construction of dams in the river. He reported that, before the dams were built, "virtually all of the land adjacent to the Qu'Appelle River in the valley was fringed by trees and shrubs." After an examination of these sites, he found that these areas had trees in the 1940s "but no longer do." He added:

> These trees had been able to withstand periodic flooding over countless decades of years [sic] prior to the construction of the dams, however once the dams were constructed floods became much more frequent and some more prolonged. This meant that the trees stood in water for long periods of time and consequently suffocated due to lack of sufficient oxygen reaching their roots. Some denuded tree trunks still stand, however the vast majority of these have been washed away by repeated flooding.[236]

In Hatch's opinion, no species of trees or plants had been eradicated due to flooding, but some species – notably Manitoba maple, American elm, and ash trees, and Saskatoon berry, chokecherry, and pincherry shrubs – had been dramatically reduced in number and largely replaced by grasses. He also found that nutrient-rich grasses "have been replaced by saline plants which are of minimal value as a food for cattle," resulting in a reduction of cattle production as a source of income.[237] The loss of trees as shelter and berries as food resulted in the decline of the white-tailed deer and coyotes, both sources of food supply for the Bands. Muskrat and beaver left owing to the decline in small shrubs and the unstable river bank, which made it difficult to maintain dens. The dams have also widened and deepened the river, leading to prolonged flooding and the inability of the Indians to ford the river as they had previously done.[238] Hatch concluded that returning the floor of the Qu'Appelle Valley to its formerly productive state "would require a great ... expenditure of money and a tremendous length of time," although he doubted whether it could be economically justified.[239]

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[236] David R.M. Hatch, David R.M. Hatch & Associates, "A Study on the Impact to the Flora and Fauna of the Flooding in the Eight (8) Indian Reservations in the Qu'Appelle Valley," March 1982, pp. 1-2 (ICC Exhibit 3, tab 6).

[237] David R.M. Hatch, David R.M. Hatch & Associates, "A Study on the Impact to the Flora and Fauna of the Flooding in the Eight (8) Indian Reservations in the Qu'Appelle Valley," March 1982, pp. 2 and 6 (ICC Exhibit 3, tab 6).

At least one consultant retained by QVIDA recognized that factors beyond the dams at Echo, Crooked, and Round Lakes contributed to the problems currently faced by the First Nations, although it must be emphasized that the foregoing effects of the dams on the reserves were not ignored or downplayed. James C. MacPherson commented that declines in the agricultural economies were compounded by successive wet seasons in the 1960s and 1970s, and by increased flows in the Qu'Appelle River resulting from upstream water management and higher volumes of water.[240] He added that the trend away from a "smaller, more labour intensive pattern of farming" common on the reserves, and towards an "increasingly mechanized, larger capital intensive farm unit," further reinforced the "shift from a viable transitional economy in the valley to a very marginal economic base on the bench" above the valley.[241] It seems self-evident to the Commission that, with developments in technology that have effectively put an end to large-scale use of horse-drawn wagons for transport and wood as a heating fuel, the primary urban markets for the reserve economies in the first half of this century have largely disappeared. Clayton Cyr of the Pasqua First Nation appeared to recognize a certain inevitability in this trend:

> You know, like even this afternoon, I've been sitting here listening to losing a way of life. We would have lost that through time anyway, you know. . . . I know I raised cattle and horses and the amount of land that we lost down there, I'd be hard pressed to put up enough hay to feed them for the winter, because I need 250 round bales, 1,500-pound round bales to put my animals through the winter. You know, when you live in a realistic world you have to look at these things. But you also have to look at

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[238] David R.M. Hatch, David R.M. Hatch & Associates, "A Study on the Impact to the Flora and Fauna of the Flooding in the Eight (8) Indian Reservations in the Qu'Appelle Valley," March 1982, pp. 3-4 (ICC Exhibit 3, tab 6).

[239] David R.M. Hatch, David R.M. Hatch & Associates, "A Study on the Impact to the Flora and Fauna of the Flooding in the Eight (8) Indian Reservations in the Qu'Appelle Valley," March 1982, pp. 8-9 (ICC Exhibit 3, tab 6).

[240] James C. MacPherson Consultants Ltd., "The Qu'Appelle Subsidiary Agreement: Bands' Perspectives," March 1984, pp. 4-11 (ICC Exhibit 4).

[241] James C. MacPherson Consultants Ltd., "The Qu'Appelle Subsidiary Agreement: Bands' Perspectives," March 1984, pp. 4-17 (ICC Exhibit 4).

> what you lost over time, you know. Like we did not, we did not lose a way of life, like I said, we would have lost it anyway.[242]

Hand in hand with these developments was the "dissatisfaction with Reserve conditions, particularly housing and lack of employment," expressed by members of the QVIDA First Nations. Some migrated away from the reserves, while others increasingly came to depend on social assistance commencing in the 1950s.[243]

THE BAND COUNCIL RESOLUTIONS OF 1977

Discovery of the Failure to Compensate Muscowpetung and Pasqua

In the early 1970s, claims activity by Indian bands increased as developments in technology and changes in government policy simplified the process of developing claims. The Commission has already commented on this phenomenon in its report on with the treaty land entitlement claim of the Kawacatoose First Nation:

> [B]efore records were readily available on microfilm and computers in the 1970s, it was difficult for a band to research a treaty land entitlement case. Most of the records were available only in Ottawa, and, with funding difficult to obtain, the expense of research made the cost of developing a claim prohibitive.
>
> These barriers to claim development started to come down in the early 1970s, particularly following Canada's confirmation in the 1973 *Statement on Claims of Indian and Inuit People* that it "recognized two broad classes of native claims –'comprehensive claims': those claims which are based on the notion of aboriginal title; and 'specific claims': those claims which are based on lawful obligations." The commitment of funds by government and, in some cases, by non-government organizations and band councils further enhanced claim activity.[244]

It was perhaps inevitable in this climate of increased awareness and funding that an inquiry would eventually be made into the failure to compensate the Muscowpetung and Pasqua Bands for those portions of their reserve lands flooded by the Echo Lake dam. In fact, Indian Affairs already had some inkling of the problem. In 1968, in response to a request from Surveyor General R. Thistlethwaite of the federal Department of Energy, Mines and

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[242] ICC Transcript, October 2, 1996, pp. 119-20 (Clayton Cyr).

[243] James C. MacPherson Consultants Ltd., "The Qu'Appelle Subsidiary Agreement: Bands' Perspectives," March 1984, pp. 4-18, 4-23 (ICC Exhibit 4).

[244] Indian Claims Commission, *Kawacatoose First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, March 1996), (1996) 5 ICCP 73 at 125-26.

Resources for information about flooding on the Muscowpetung reserve, H.T. Vergette, Head of Indian Affairs' Land Surveys and Titles Section, had replied:

> In 1941 the Federal Department of Agriculture proposed the establishment of a system of irrigation and storage reservoirs in the Qu'Appelle River valley which would have resulted in the flooding of some land on the Muscowpetung and Pasqua Reserves. However, we have found nothing in our records to indicate that any reserve land was taken for this purpose or of any compensation having been paid to the Band in this connection.[245]

It appears that nothing further came of this inquiry.

Four years later, however, Lumsden MLA Gary Lane was approached by Muscowpetung Chief Dave Benjoe to inquire into a number of issues on the Band's behalf, including the question of whether the Band and the neighbouring Pasqua Band had ever been paid for the flooding rights obtained by the federal government in the early 1940s. Lane's inquiry on September 6, 1972,[246] to Jean Chrétien, the Minister of Indian Affairs and Northern Development, prompted a fruitless investigation by J.G. Watson, who by then had been made Director of the PFRA:

> The file indicates that the matter was discussed with the Director of Indian Affairs, Department of Mines and Resources, and at that time that Department estimated the value of the damages to be $4,800 on the Muscowpetung Reserve and $3,250 on the Pasqua Reserve. Our files however do not show that compensation was ever made [sic] and we do not appear to have title to or an easement over this property. However with the considerably better hydrologic information now available to us we believe that the effect of the construction of this dam on the water levels and flooding would be considerably less than was estimated at the time of the construction.[247]

On receipt of this information, Vergette advised the Indian Affairs Departmental Secretariat that, since areas of the Muscowpetung reserve had been flooded by the Echo Lake dam, "this Department will be approaching PFRA with a view to obtaining compensation for the Muscowpetung Band."[248] Lane was similarly informed.[249]

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[245] H.T. Vergette, Head, Land Surveys and Titles Section, Department of Indian Affairs and Northern Development, to R. Thistlethwaite, Surveyor General, Legal Surveys and Aeronautical Charts Division, Department of Energy, Mines and Resources, August 21, 1968, DIAND file 675/30-2-80, vol. 1 (ICC Documents, p. 747).

[246] Gary Lane, MLA, Lumsden Constituency, Province of Saskatchewan, to Jean Chrétien, Minister, Department of Indian Affairs and Northern Development, September 6, 1972, DIAND file 675/8-4, vol. [2] (ICC Documents, pp. 840-41).

[247] J.G. Watson, Director, PFRA, Department of Regional Economic Expansion, to R.A. Letilley, Western Region, Department of Regional Economic Expansion, September 27, 1942, PFRA file 928/7E4, vol. 4 (ICC Documents, p. 843).

On February 23, 1973, P.B. Lesaux, Director of the Indian-Eskimo Economic Development Branch of Indian Affairs, finally brought the matter up with Watson:

> In 1943 P.F.R.A. completed construction of the Echo Lake water storage dam, the contract for the construction being authorized by P.C. 7900 dated September 3, 1942. The dam affected the water level of the lake bordering Muscowpetung Indian Reserve No. 80 and the Pasqua Indian Reserve No. 79. The Muscowpetung Band has recently made inquiries as to the amount of compensation paid by P.F.R.A. for the loss of Indian reserve lands; however, *a review of our records has indicated no authority or agreement for such flooding by P.F.R.A.*, nor is there any evidence that compensation was paid to this Department for the benefit of the Indian Bands concerned.
>
> In a letter dated November 1, 1972 (your file reference 928/7E4) Mr. R.A. Letilley, Western Region, DREE, indicated that the Department of Regional Economic Expansion, as well, had not been able to locate any record of such an agreement being made or compensation paid. Accordingly, it appears that the Band has a legitimate claim for monetary compensation, or for lands in exchange for those that were flooded.
>
> In view of the above I would appreciate your arranging for officers of your department to meet with representatives of the Muscowpetung and Pasqua Bands to reach a mutual settlement of this claim.[250]

On March 1, 1973, incoming PFRA Director W.B. Thomson responded that, since it was 30 years since the Echo Lake dam had been built, it would take the PFRA some time to search its files and assess the effect of the works. In particular, he noted that, because the Pasqua Lake project on which Fetterly based his estimate of damages had been abandoned in favour of the dam on Echo Lake with its lower full supply level, "the flooded acres referred to [in Fetterly's report] . . . must be considerably greater than what has actually occurred." Thomson nevertheless committed the PFRA to undertake studies to determine the effect of the structure on Indian lands and to contact Indian Affairs with the results.[251]

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[248] H.T. Vergette, Chief, Lands Division, Department of Indian and Northern Affairs, to Departmental Secretariat, Department of Indian and Northern Affairs, November 14, 1972, DIAND file 675/8-4, vol. [2] (ICC Documents, p. 849).

[249] Russell C. Moses, Special Assistant, Departmental Secretariat, Department of Indian and Northern Affairs, to Gary Lane, MLA, Government of Saskatchewan, November 22, 1972, DIAND file 675/8-4, vol. [2] (ICC Documents, p. 850).

[250] P.B. Lesaux, Director, Indian-Eskimo Economic Development Branch, Department of Indian and Northern Affairs, to J.G. Watson, Director, PFRA, Department of Regional Economic Expansion, February 23, 1973, DIAND file F-4320-9, vol. 1 (ICC Documents, p. 852). Emphasis added.

Within the month, R.B. Godwin, Chief of the PFRA's Hydrology Division, reported three findings to Planning and Investigations Engineer W.M. Berry:

> 1. The average level of Pasqua Lake is from 1 to 1.5 feet higher than it was prior to construction of the Echo Lake control structure.
> 2. The new control structure has almost no effect on flood flows in high-flow years.
> 3. The greatest difference in lake levels occur in the fall of each year [i.e., haying time] when the new Echo Lake control structure is closed to control the levels of both Echo and Pasqua Lake.[252]

Berry relayed this information to Thomson, adding that the structure had been operated to maintain a water level of 1571.5, or six inches higher than originally planned. He also noted that the structure increased the duration of flooding at lower water levels.[253] In a separate memorandum, Regional Engineer G.T. Forsyth estimated "a vertical range of 2.2 feet within which haying has been adversely affected" by the erection of the dam, which translated into flooded areas of 60 acres on the Pasqua reserve and 560 acres on the Muscowpetung reserve. However, he added:

> The effects of the operation of the Echo Lake Structure on these Reserves cannot have been entirely harmful. Certain beneficial effects must have been experienced including:
>
> a) Increased productivity from lands subject to some limited flooding, which, without the structure, would have received none.
>
> b) Increased fish production as a result of greatly improved spawning conditions associated with sustained higher lake levels. . . .
>
> c) Improved nesting conditions for and productivity of water fowl, also related to more stable water levels.

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[251] W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, to P.B. Lesaux, Director, Indian-Eskimo Economic Development Branch, Department of Indian and Northern Affairs, March 1, 1973, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 854).

[252] R.B. Godwin, Chief, Hydrology Division, PFRA, Department of Regional Economic Expansion, to W.M. Berry, Planning and Investigations Engineer, PFRA, Department of Regional Economic Expansion, March 23, 1973, PFRA file 928/7Q2, vol. 10 (ICC Documents, p. 861).

[253] W.M. Berry, Planning and Investigations Engineer, PFRA, Department of Regional Economic Expansion, to W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, March 27, 1973, PFRA file 928/7E4, vol. 4 (ICC Documents, pp. 867-68).

> d) Enhancement of the value of Indian lands adjacent to the lake-shore due to relatively more constant water levels.[254]

With this data in hand, the PFRA was ready to commence negotiations. In asking Berry on April 10, 1973, to calculate a confidential settlement figure for bargaining purposes, Thomson suggested a cash settlement "representing the present value of future and past annual losses to the Bands," using the discounted value of native hay as the basis for evaluating "the net annual income lost per year."[255]

Before these calculations were prepared, Thomson held a preliminary meeting the same day with F. Clark, Indian Affairs' Regional Director for Saskatchewan, to outline the basis for negotiations. In a note to file following the meeting, he commented:

> As a first step in settling this claim, it was agreed that PFRA would determine the area of land detrimentally affected by the operation of the structure. This would involve the determination of the amount of land that has been removed from hay production or grazing on the two reserves as a result of the operation of the Echo Lake structure. The Indian Affairs people feel that the Indians would want to confirm these figures, possibly through the services of an outside consultant; consequently our calculations will have to be clearly prepared and illustrated.
>
> It was stressed that the Indians would in all probability not wish to give up title to the land, and that settlement should be for flooding rights or flood easements. The amount of the settlement would have to be retroactive to the time the structure was built.[256]

The following day, Berry provided Thomson with preliminary calculations based on Fetterly's original estimated damages of $8050, reduced by $2400 to $5650 to reflect the lowering of the full supply level by three feet when the proposed Pasqua Lake dam was replaced by the structure on Echo Lake. Berry then applied interest at various rates over the 30-year interval since the dam's construction, arriving at compensation ranging from $13,712 at 3 per cent to $24,419 at 5 per cent.[257] Thomson forwarded these figures to Acting Assistant Deputy Minister M.J. Fitzgerald, commenting:

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[254] G.T. Forsyth, Regional Engineer, PFRA, Department of Regional Economic Expansion, to W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, April 9, 1973, PFRA file 928/7E4, vol. 4 (ICC Documents, pp. 873-74).

[255] W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, to W.M. Berry, Planning and Investigations Engineer, PFRA, Department of Regional Economic Expansion, April 10, 1973, PFRA file 928/7E4, vol. 4 (ICC Documents, pp. 867-68).

[256] Memorandum to file, W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, April 10, 1973, PFRA file 928/7E4, vol. 4 (ICC Documents, p. 876).

> It is very doubtful if the Indians at the present time would settle for anything near this figure. It is quite probable they would demand a figure several times this amount.[258]

A week later Thomson had another reason to doubt that the Indians would be prepared to accept Berry's preliminary figures. On April 19, 1973, Berry reported again, this time employing the parameters set forth in Thomson's memorandum of April 10, 1973:

> The method of evaluation sums the past and future losses of hay production to the Bands. Our study has assumed:

Period of past losses	1943-1972 (years)
Elev. range of new flooding	1570.0-1572.0 (geodetic)
Acreage lost within flooding range:	
- in Muscowpetung Reserve	500 acres
- in Pasqua Reserve	50 acres
Value of tame hay from Annual Reports of Sask. Dept. Of Agriculture	
Value of native hay is 60% of tame.	
Costs of production from DBS statistics	
Future net return/acre/year	$3.50
Av. interest rate applicable to compounding past losses to present	4 & 5%
Interest rate applicable to discounting future losses to present	6 & 8%

> Based on the foregoing assumptions, the following results were obtained.[259]

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[257] W.M. Berry, Planning and Investigations Engineer, PFRA, Department of Regional Economic Expansion, to W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, April 11, 1973, PFRA file 928/7E4, vol. 4 (ICC Documents, p. 878).

[258] W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, to M.J. Fitzgerald, Acting Assistant Deputy Minister (Western Region), Department of Regional Economic Expansion, April 11, 1973, PFRA file 928/7E4, vol. 4 (ICC Documents, p. 880).

[259] W.M. Berry, Planning and Investigations Engineer, PFRA, Department of Regional Economic Expansion, to W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, April 19, 1973 (ICC Exhibit 3, tab 4, pp. 19-20).

	LOSS PER ACRE	
	Interest on past losses	
	4%	5%
Present value of past production [per acre]	$141.55	$169.65
Estimated value of 1973 production [per acre]	$3.50	$3.50
Present value of future production	$58.33	$58.33
– at 6% discount rate	$43.75	$43.75
– at 8% discount rate		
Total of Losses		
– at 6% discount rate	**$203.38**	**$231.48**
– at 8% discount rate	**$188.80**	**$216.90**

	TOTAL LOSSES			
	500 acres on Muscowpetung Reserve		50 acres on Pasqua Reserve	
	Interest on past lossses		Interest on past losses	
	4%	5%	4%	5%
Present value of past production	$70,775	$84,825	$7,078	$8,483
Value of 1973 production	$1,750	$1,750	$175	$175
Present value of future production				
– at 6% discount rate	$29,165	$29,165	$2,816	$2,916
– at 8% discount rate	$21,875	$21,875	$2,187	$2,187
Total of Losses				
– at 6% discount rate	**$101,690**	**$115,740**	**$10,169**	**$11,574**
– at 8% discount rate	**$ 94,400**	**$108,450**	**$ 9,440**	**$10,845**

Clearly, based on these calculations, Thomson could see that damage calculations for the Pasqua and Muscowpetung Bands alone might reach close to $130,000.

Fitzgerald reported the matter to the Deputy Attorney General to obtain approval to negotiate a settlement with the Bands.[260] Authority to proceed was given on July 11, 1973,[261] and, on August 31, 1973, Thomson wrote to Indian Affairs' Acting Regional Director for Saskatchewan, W.D.G. McCaw, to request that he arrange a meeting to discuss the claim.[262]

Two weeks later, on September 13, 1973, Thomson met with representatives of Indian Affairs, the Piapot and Muscowpetung Bands, and the Province of Saskatchewan, but the discussions quickly reached an impasse:

> The Chief of the Muscowpetung Reserve quoted $10,000 per year for 24 years (since 1959) or $240,000 as settlement for damages caused by the Echo Lake structure. Mr. Thompson [sic] then stated PFRA were prepared to settle for $20-25,000 based on the amount ($5,600) which should have been paid to the Band in 1941-42 with compounded interest to date. Because of the wide variation of the two amounts very little discussion followed.
>
> Before departing, Mr. Thomson told me he had asked the Chief of the Muscowpetung Reserve to submit a written claim substantiating the amount acceptable to him.[263]

Muscowpetung Chief Benjoe also noted that no water control works had ever been built on the reserve as complete or partial consideration for the flooding damages, and that the dam had not benefited the Band, "either from the point of view of water level stability or improved fish and waterfowl habitat." Muscowpetung Councillor William Pratt asked whether the lakes could be lowered to their original levels, but S.R. Blackwell of Saskatchewan's Department of the Environment responded that it would not be feasible. The Band representatives also raised the need for a bridge across the river to permit haying operations on IR 80B.[264]

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[260] W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, to F.A. Clark, Regional Director, Saskatchewan, Department of Indian and Northern Affairs, April 30, 1973, PFRA file 928/7E4, vol. 4 (ICC Documents, p. 882).

[261] M.J. Fitzgerald, Acting Assistant Deputy Minister (Western Region), Department of Regional Economic Expansion, to W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, July 11, 1973, PFRA file 928/7E4, vol. 4 (ICC Documents, p. 888).

[262] W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, to W.D.G. McCaw, Acting Regional Director, Saskatchewan, Department of Indian and Northern Affairs, August 31, 1973, DIAND file 675/8-4, vol. 2 (ICC Documents, p. 889).

[263] J. Stoyko, Agriculture Specialist, Department of Indian and Northern Affairs, to W.D.G. McCaw, Regional Superintendent of Economic Development, Saskatchewan Region, Department of Indian and Northern Affairs, September 14, 1973, DIAND file 675/8-4, vol. 2 (ICC Documents, pp. 892-93). Stoyko later wrote that the Bands based their claim on the loss of 500 acres of hay land which would have annually produced 500 tons of hay, or one ton per acre, worth $20 per ton (or $10,000 per year) for 24 years: "Information for File," J. Stoyko, Regional Agriculture Specialist, Saskatchewan Region, Department of Indian and Northern Affairs, October 16, 1973, DIAND file F4320-9, vol. 1 (ICC Documents, p. 908).

The PFRA Investigates the Damages

In the wake of this meeting, Thomson instructed his staff to investigate five aspects of the Indians' claims:

1. Reassess the "top elevation" affected by flooding.
2. Reassess the "bottom elevation" to be used in defining the flood zone.
3. Review old files to determine the basis of settlement used for deeded land in 1942, and perhaps use the same for Indian lands.
4. Review Mr. Berry's calculation of net return foregone, using figures of 4% and 8% for past interest and future discount.
5. Evaluate the severance factor.[265]

McMorine, now a Special Projects Engineer, visited the Muscowpetung reserve with Dr Jan Looman of the the federal Department of Agriculture Research Station to "assess the type, yield, and probable value of native hay growing in the area immediately adjacent to the present water edge" to determine whether flooded hay lands had been replaced by new hay lands at a higher elevation. Looman found that the average annual yield from the hay lands would have been two tons per acre.[266] McMorine reported finding " 'slough hay' occurring just above the margin of the present lake, and presumably of that which would have been growing in the elevation zone 1570-1572 if the Echo Lake Dam had not been built."[267]

Later, McMorine also reviewed historical water level figures "to determine the years in which it would have been impossible to harvest hay in the flats at the west end of Pasqua (Qu'Appelle) Lake during the period 1943-1972, *if the Echo Lake Dam had not been built*." Assuming August 1 of each season "as the date later than which flooding of hay land could not be tolerated and still allow a harvest," McMorine found that in 15 of the 30 years from 1943 to 1972, hay would not have been harvested owing to wet conditions. The number rose to 18 years with no harvest if June 1 was substituted as the critical cut-off date, resulting in a reduction of Looman's "effective" annual yield from two tons to roughly one ton per acre.[268]

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[264] G.T. Forsyth, Regional Engineer, PFRA, Department of Regional Economic Expansion, "Notes of Meeting at Fort Qu'Appelle Offices of Canada DIAND," September 13, 1973, PFRA file 928/7E4, vol. 4 (ICC Documents, p. 891).

[265] Memorandum to file, J.G.S. McMorine, Special Projects Engineer, PFRA, Department of Regional Economic Expansion, October 11, 1973, PFRA file 928/7E4, vol. 5 (ICC Documents, pp. 903-04).

[266] J.G.S. McMorine, Special Projects Engineer, PFRA, Department of Regional Economic Expansion, to W.M. Berry, Planning and Investigations Engineer, PFRA, Department of Regional Economic Expansion, October 9, 1973, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 899).

[267] Memorandum to file, J.G.S. McMorine, Special Projects Engineer, PFRA, Department of Regional Economic Expansion, September 27, 1973, PFRA file 928/7E4, vol. [4] (ICC Documents, p. 895).

In a comprehensive report dated October 11, 1973, McMorine verified the existence of a ford across the Qu'Appelle River that had likely been used to access Muscowpetung's hay flats north of the river before 1943:

> The existence of this old ford . . . should have considerable bearing on the obligation to construct, or the desirability of constructing, a bridge to provide access to hay flats north of the river, which are presently severed by the river from the main part of the Reserve.[269]

Although McMorine suggested checking with residents of the reserve to determine whether the ford had been used to access the northern hay flats and whether this use had been ended by construction of the dam, he believed that construction of a bridge might assist in reaching a settlement of the flooding issue in any event.[270]

McMorine found further evidence to suggest that, first, the elevation of Echo Lake in years of "ordinary or average runoff" before 1942 was the reservoir's authorized full supply level of 1571; second, the full supply level was quietly raised to 1571.5 in 1948 (being "a more desireable [sic] level from the point of view of the general public");[271] and, third, to permit haying operations at the west end of Pasqua Lake, it had been necessary to drop the level to 1570.8. He recommended that settlement be made up to elevation 1574 since settlements with private land owners had been made on that basis, and since a higher figure than 1572 should be used "in view of capillary action and freeboard," which appeared to cause increased salinity and to adversely affect vegetation even above the full supply level. He also recommended that the affected areas be surveyed, rather than relying on old small-scale mapping, since he anticipated that the Bands would retain independent consultants to verify the PFRA's figures.[272]

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[268] J.G.S. McMorine, Special Projects Engineer, PFRA, Department of Regional Economic Expansion, to W.M. Berry, Planning and Investigations Engineer, PFRA, Department of Regional Economic Expansion, October 9, 1973, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 899). In later work, McMorine revised these figures using 1570 rather than 1570.5 as the elevation below which haying operations would not have been possible, absent the dam. He concluded that, at elevation 1570, if June 1 was the critical date "later than which flooding of hay land could not be tolerated," there would be 19 out of 30 years with no hay harvested, as opposed to 18 years at elevation 1570.5. The figures dropped to 18 of 30 years if either July 1 or August 1 was used as the critical date at elevation 1570, rather than 17 years for July 1 or 15 years for August 1 at elevation 1570.5: J.G.S. McMorine, Special Projects Engineer, PFRA, Department of Regional Economic Expansion, to G.T. Forsyth, Regional Engineer, PFRA, Department of Regional Economic Expansion, October 9, 1973, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 899).

[269] Memorandum to file, J.G.S. McMorine, Special Projects Engineer, PFRA, Department of Regional Economic Expansion, October 11, 1973, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 900).

[270] Memorandum to file, J.G.S. McMorine, Special Projects Engineer, PFRA, Department of Regional Economic Expansion, October 11, 1973, PFRA file 928/7E4, vol. 5 (ICC Documents, pp. 906-07).

[271] J.G.S. McMorine, Special Projects Engineer, PFRA, Department of Regional Economic Expansion, to G.T. Forsyth, Regional Engineer, PFRA, Department of Regional Economic Expansion, October 30, 1973, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 923).

In the course of his investigations, McMorine reviewed the land acquisitions relating to the dams at Round and Crooked Lakes. He discovered that one private owner, G.R. Walberg, had been paid $2500 for a flooding easement, but other owners had provided flood agreements at no cost to the PFRA. With regard to calculating the area of affected reserve lands, he found:

> Acreage involved was taken from ***topographic*** plans made by PFRA in 1942 (not from legal surveys) and covered land ***up to FSL*** [full supply level] ***only*** (1451.0), in contrast to the situation in regard to landowners adjacent to the Echo Lake Reservoir, where easements were obtained and paid for to an elevation ***3 feet above FSL***.[273]

Thomson toured the Muscowpetung and Pasqua reserves on October 12, 1973, and advised Band representatives that the PFRA would survey that fall to quantify the land flooded. J. Stoyko, Indian Affairs' Regional Agricultural Specialist, recommended that his Department refrain from becoming "too involved" at that time since "[t]here are a number of ways of determining compensation for flood damage to lands over a period of years and PFRA, I am confident, are competent to prepare initial proposal for presentation to the Bands involved."[274]

The Negotiations Resume

On October 31, 1973, Thomson forwarded a revised offer to Indian Affairs. Whereas the PFRA's initial offer had discounted Fetterly's estimated damages of $8,050 to reflect lower levels of flooding caused by the Echo Lake dam, the new offer eliminated this discount on the basis that the PFRA had agreed in 1941 to Fetterly's approach:

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[272] Memorandum to file, J.G.S. McMorine, Special Projects Engineer, PFRA, Department of Regional Economic Expansion, October 11, 1973, PFRA file 928/7E4, vol. 5 (ICC Documents, pp. 900-07).

[273] Memorandum to file, J.G.S. McMorine, Special Projects Engineer, PFRA, Department of Regional Economic Expansion, October 29, 1973, PFRA file 928/7E4, vol. 5 (ICC Documents, pp. 916-17). This difference of three feet is likely attributable to the decision in 1942 to build only the Echo Lake dam and to forgo the structure at Pasqua Lake.

[274] "Information for File," J. Stoyko, Regional Agriculture Specialist, Saskatchewan Region, Department of Indian and Northern Affairs, October 16, 1973, DIAND file F4320-9, vol. 1 (ICC Documents, p. 908).

> The point I wish to make is that in 1941 agreement was reached between our Departments in regard to the procedures to be followed and the amount of the settlement to the affected Indian Bands. On this basis, PFRA commenced construction in 1942 and completed the structure in 1943. The only omission appears to be the transfer of funds from our Department to the Indian Affairs Branch, although records do indicate that settlements were made at the same time for flooding easements on privately owned lands.
>
> We consider this matter can now best be resolved by our Department requisitioning a cheque which would include allowance for interest, compounded since 1943, using a rate of 4½% which is somewhat above the average which prevailed throughout the period. The amount of the payment would be $17,978 for the Muscowpetung Band and $12,172 for the Pasqua Band [for a total of $30,150.00]. I am prepared to recommend to officials of our Department that this payment now be processed as full and final settlement of this matter.
>
> While it is appreciated that it is possible that this payment will not fully satisfy the Indian Bands today, we nevertheless consider it represents a fair settlement based on the conditions at the time the structure was built and, furthermore, it is based on the amount agreed upon in 1941 between our Departments. It is most unlikely that we would have proceeded with the construction of the Echo Lake structure had the settlement been substantially different or had officials of your Department not agreed to its construction. It should also be understood that the structure has been operated to stabilize the levels of Pasqua and Echo Lakes since the time of its construction at levels corresponding to the natural level in years of average runoff (prior to 1942). It is hard to accept that this regulation has not been very beneficial in itself to the Indian Bands.[275]

Stoyko anticipated that the "PFRA will undoubtedly be asking us [Indian Affairs] to attend any meetings they arrange as they are anxious to find a way of inducing the Indians to lower their claim substantially."[276]

The PFRA's proposal was forwarded to Chiefs David Benjoe and Stanley Pasqua of the Muscowpetung and Pasqua Bands on December 17, 1973, with a request that Band Council Resolutions be prepared either accepting or rejecting the offer.[277] Three months later, Senior Development Officer N.J. Bowering of Indian Affairs replied to headquarters on behalf of the Bands:

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[275] W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, to J.W. Evans, Acting Director, Indian-Eskimo Economic Development Branch, Department of Indian and Northern Affairs, November 5, 1973, DIAND file 675/8-4, vol. 2 (ICC Documents, pp. 925-26).

[276] J. Stoyko, Agricultural Specialist, Department of Indian and Northern Affairs, to W.D.G. McCaw, Regional Superintendent of Economic Development, Saskatchewan Region, Department of Indian and Northern Affairs, November 27, 1973, DIAND file F4320-9, vol. 1 (ICC Documents, p. 929).

[277] N.J. Bowering, Senior Development Officer, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, to Chief David Benjoe, Muscowpetung Band, and Chief Stanley Pasqua, Pasqua Band, December 17, 1973, DIAND file F4320-9, vol. 1 (ICC Documents, p. 931).

> Letters were sent to the respective Chiefs on December 17, 1973 and copies were sent to Mr. Stoyko at Regional office. Today the Council of Muscowpetung met here (I should say the Chief and 2 Councillors) and they approached me regarding the noted subject. It appears that the Council will not accept the $17,978.00 as final settlement and we, no doubt, will receive a Band Council Resolution to this effect soon, I hope. It was necessary to have the B.C.R. agreed to and signed by Councillors who were absent today, therefore the Resolution will be forthcoming. Those present would accept the $17,978.00 as "initial" settlement only.
>
> We have not had any response to our same letter sent to Pasqua Band and we can expect the same decision from them as was made by Muscowpetung.[278]

When no further response had been received from either Band by July 12, 1974, Bowering sought instructions as to whether he should pursue the matter or wait for the Bands to act. He added that "[t]he heavy flooding this past spring has not improved feelings whatsoever and the high water is expected to remain all summer."[279] H.R. Phillips, Indian Affairs' Acting Chief of Land Administration, replied:

> [I]t is regrettable that the two Band Councils still appear reluctant to make a decision on this matter.
>
> As you will appreciate, however, it is in the interest of the Bands to reach a settlement with P.F.R.A. and I therefore suggest that you contact the Band Councils again in this regard.[280]

Although an approach was made, it did not result in a response,[281] but the Muscowpetung Band Council soon expressed concern about "the flooding of Hay Grounds and the loss of hay for the farmers who depend on the valley floor for feed." The Council asked Bowering to determine what Band members might "expect by way of compensation or funds with which to purchase feed for their livestock," assuming a loss of 70,000 bales at $1.00 per 50-pound bale.[282]

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[278] N.J. Bowering, Senior Development Officer, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, to H.T. Vergette, Chief, Lands Division, Department of Indian and Northern Affairs, March 27, 1974, DIAND file 675/8-4, vol. [illegible] (ICC Documents, p. 932).

[279] N.J. Bowering, Senior Development Officer, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, to Acting Chief, Land Administration, Department of Indian and Northern Affairs, July 12, 1974, DIAND file 675/8-4, vol. 2 (ICC Documents, p. 941).

[280] H.R. Phillips, Acting Chief, Land Administration, Department of Indian and Northern Affairs, to N.J. Bowering, Senior Development Officer, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, July 23, 1974, DIAND file 675/8-4, vol. 2 (ICC Documents, p. 942).

[281] W.A.S. Barnes, District Supervisor, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, to H.R. Phillips, Acting Chief, Land Administration, Department of Indian and Northern Affairs, August 1, 1974, DIAND file 675/8-4, vol. [illegible] (ICC Documents, p. 945).

When Bowering put the question to M.A. Irvine, Indian Affairs' Regional Agrologist and Land Use Specialist, Saskatchewan Region, Irvine answered:

> It is difficult to deal with five or six farmers or even one reserve as an isolated case, for all individuals and all reserves are entitled to the same equitable treatment.
>
> Indian farmers throughout the Province suffer annual losses for a variety of reasons, unfortunately available funds are insufficient to cope with subsequent requests.
>
> The question of compensation for flooded hay meadows along the Qu'Appelle Basin, as a special case, is presently under study; hopefully a satisfactory solution is forthcoming.[283]

Irvine had considerable sympathy for the plight of the Muscowpetung and Pasqua Bands, however, and in a paper entitled "A Viewpoint on the Qu'Appelle Valley Indian Band Damage Claims" he noted that Standing Buffalo also deserved consideration:

> Prior to the construction of PFRA dams along the Qu'Appelle River there were suggestions of acquiring the consent of affected Bands or expropriating Indian lands. A search of the records has failed to divulge that either course of action was taken. Indian Bands suffering damage from high floodwaters are requesting compensation and it appears difficult to dispute the legitimacy of their claims.
>
> One body of opinion suggests that had a final settlement been reached at that time present negotiations would not have been required. This is not necessarily true. The Bands were advised prior to construction of the dam that flood damage would be minimal and suggestions were made that much of the flooding would benefit affected haylands. The extensive flooding presently encountered was not foreseen at that time. . . .
>
> In light of subsequent events and circumstances these Bands feel the original estimate [by Fetterly], as well as the interest rate used [by the PFRA in its offer], is unrealistically low. In addition, Piapot and Standing Buffalo Indian Bands are involved in the dispute. . . .
>
> The question of determining accumulative damages involves annual estimates of hay crops, varying prices and other factors. A final settlement for past damages is desirable. It is extremely doubtful that a total final settlement can be negotiated due to

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[282] N.J. Bowering, Senior Development Officer, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, to A. Gross, Acting Regional Superintendent of Economic Development, Saskatchewan Region, Department of Indian and Northern Affairs, August 28, 1974, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 946).

[283] M.A. Irvine, Regional Agrologist and Land Use Specialist, Department of Indian and Northern Affairs, to N.J. Bowering, Senior Development Officer, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, September 11, 1974, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 947).

> the uncertainties involved in predicting future damages. Land exchange appears be the only lasting solution. This would require the full concurrence of the Bands involved and the acquisition of suitable land for exchange.
>
> The possibility of exchanging land depends on:
>
> 1. The quantity, quality and location of land offered in exchange.
> 2. The nature and extent of recoverable damage losses.
> 3. Whether or not the Bands would exchange land under any circumstances.
>
> The possibility of land exchange should be discussed, however, most Bands are not likely to settle for any reasonable exchange, leaving annual damage negotiations as the only obvious alternative.
>
> PFRA argue that most Reserve flood damage is from natural causes and suggest Piapot hay meadows have not been damaged as a result of the Fort Qu'Appelle dam. If these arguments are valid, they should be accompanied by an engineer's report which fully and adequately describes the situation for the benefit of the Indian Bands.[284]

On November 29, 1974, W.A.S. Barnes, Indian Affairs' District Supervisor for the Touchwood File Hills Qu'Appelle District, reported that no further progress had been made with regard to compensation for flooding damages to the Muscowpetung and Pasqua reserves. He had been advised, however, that the Bands' claims would be handled by the Federation of Saskatchewan Indians (FSI).[285] In light of this information, G.A. Poupore, Manager of Indian Lands, drew the matter to the attention of the Indian Affairs' Office of Claims Negotiation in January 1975.[286]

Gary Lane, the Saskatchewan MLA who had originally inquired about the failure to compensate the Muscowpetung and Pasqua Bands and had made several follow-up inquiries, continued to intervene on the Bands' behalf. He contacted Saskatchewan's Minister of Co-operation and Co-operative Development, Don Cody, to ask why Indian farmers had not been permitted to benefit from provincial flood compensation programs in the same manner as private farmers. Cody responded:

> When the flood assistance program was being established last spring, we worked in conjunction with Federal officials to ensure that the policies were not inconsistent

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[284] M.A. Irvine, "A Viewpoint on the Qu'Appelle Valley Indian Band Damage Claims," September 12, 1974, DIAND file F4320-9, vol. 1 (ICC Documents, pp. 949-52).

[285] W.A.S. Barnes, District Supervisor, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, to H.R. Phillips, Acting Chief, Land Administration, Department of Indian and Northern Affairs, November 29, 1974, DIAND file 675/8-4, vol. [illegible] (ICC Documents, p. 956).

[286] G.A. Poupore, Manager, Indian Lands, Department of Indian and Northern Affairs, to Director, Office of Claims Negotiation, January 9, 1975, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 958).

> with federal guidelines and that there would not be duplication of assistance programs.
>
> Because the Indian Reserve lands are administered by the Federal Government, we were advised that the cost of flood assistance on these lands would be borne directly by the Federal Department of Indian Affairs and Northern Development.
>
> It appears therefore that any future correspondence relating to possible claims for flood damage on Indian lands should be directed to the appropriate federal authorities.[287]

Lane made similar inquiries of Indian Affairs, and Saskatchewan Regional Director O.N. Zakreski replied that, although the Department did not pay compensation for flood damage to hay lands or other property on Indian reserves, it did pay for "emergency measures such as sandbagging, movement of stored grain, testing and treatment of water, sanitation, disinfecting, etc., as well as any emergency dyking or evacuation." However, Zakreski disputed Cody's claim that the province of Saskatchewan was not responsible for compensating Indian bands:

> [I]t is our contention that as citizens of the Province of Saskatchewan Indian people are entitled to the benefit of Provincial programs, whether or not they reside on Indian reserves. Flood assistance as a result of damage done by dams, construction or other interference caused by other Departments or Agencies, should not be considered the responsibility of our Department.[288]

On a trip to Saskatchewan on February 28, 1975, the Minister of Indian Affairs undertook to look into the issue.[289]

The Bands Retain Counsel

Although Indian Affairs had been advised that further negotiations on behalf of the western Qu'Appelle Valley Bands would be conducted by the Federation of Saskatchewan Indians, lawyer Roy Wellman of Regina informed PFRA Director Thomson on July 28, 1975, that he had been retained by the Piapot, Pasqua, Muscowpetung, and Standing Buffalo Bands with regard to the damages caused by the Echo Lake dam. Wellman noted that the Bands had not consented to the project, flooding had been more extensive than foreseen at the time of construction, and damages were not minimal as initially suggested. On behalf of the Bands, he submitted the following claim:

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[287] Don Cody, Minister, Department of Co-operation and Co-operative Development, Government of Saskatchewan, to Gary Lane, MLA, Government of Saskatchewan, January 15, 1975, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 959).

[288] O.N. Zakreski, Regional Director, Saskatchewan, Department of Indian and Northern Affairs, to Gary Lane, MLA, Government of Saskatchewan, January 28, 1975, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 960).

[289] Les Healy, Special Assistant to the Minister, Department of Indian and Northern Affairs, to Arthur Kroeger, Deputy Minister, Department of Indian and Northern Affairs, March 11, 1975, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 962).

> (1) The representatives would like their hay lands to be put back in the same state as they were prior to construction of PFRA dams;
> (2) The reserves to be compensated for every year since construction of the dams;
> (3) Marshes drained and seeded to grass;
> (4) Reserves to be fully compensated until such time as hay could be cut;
> (5) The water to be channeled so as to by-pass marshes and diking.[290]

Wellman proposed that a meeting be convened to determine whether any common ground existed to form the basis for discussions.

In reply, Thomson noted that the Echo Lake structure and its effect on the reserve lands of the Pasqua and Muscowpetung Bands had been under review by the PFRA and Indian Affairs for approximately two years, and that he was awaiting "advice" from Indian Affairs. In the meantime, he forwarded Wellman's letter to the PFRA's lawyers.[291]

Wellman, however, demanded a meeting for preliminary discussions not later than September 30, 1975, failing which he was instructed to examine other legal options open to the Bands.[292] Thomson responded with a request for information:

> We have had representation from the Indians with respect to the Echo Lake control structure and its effect on the Pasqua and Muscowpetung Reserves. We are not, however, familiar with claims on the Piapot or Standing Buffalo Reserves. We would have to have some form of statement of claim or background information relating to these two Reserves before a meaningful meeting can be held.
>
> If this can be supplied to us, I am sure we could arrange for a meeting during the month of October at your convenience.[293]

Thomson's letter was met with silence. However, on March 24, 1976, Wellman and the Chiefs and other members of the Muscowpetung and Pasqua Bands assembled in the lawyer's office to discuss the claim. Welman advised his clients that the PFRA had acknowledged that the two reserves had sustained marsh damage from the erection of the Echo Lake dam, and Indian Affairs had encouraged the Bands to submit damage claims. However, the preparation of a claim had been hampered by the lack of survey evidence to quantify the area flooded.

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[290] W. Roy Wellman, Wellman & MacIsaac, Barristers & Solicitors, to W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, July 28, 1975, PFRA file 928/7E4, vol. 5 (ICC Documents, pp. 978-79).

[291] W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, to W. Roy Wellman, Wellman & MacIsaac, Barristers & Solicitors, August 1, 1975, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 980).

[292] W. Roy Wellman, Wellman & MacIsaac, Barristers & Solicitors, to W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, August 13, 1975, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 981).

[293] W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, to W. Roy Wellman, Wellman & MacIsaac, Barristers & Solicitors, August 18, 1975, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 983).

The discussion then turned to the damages sustained by the Bands, including loss of marshlands, a reduction in game and waterfowl, the need to reduce cattle herds, and increased reliance on welfare as increasing numbers of Band members were forced to subsist on fewer resources. Moreover, the Bands claimed that they had never benefited from the irrigation opportunities for which the dam had been constructed in the first place. However, Band members indicated that they would be prepared to accept replacement lands in exchange for those flooded. Finally, the minutes of the meeting indicate that, when asked by a member of the Muscowpetung Band whether flooded areas would be sold or leased, Wellman stated that "[i]t was just a damage claim . . . not giving it up, it would still belong to Muscowpetung."[294]

Finally, Wellman initiated contact again with Thomson on April 20, 1976, when he wrote to ask for information about the number of cattle and the number of welfare recipients on the Piapot, Muscowpetung, Pasqua, and Standing Buffalo reserves in 1943 and 1975.[295] No further claims or demands were made by Wellman at that time. However, the interests of the Bands were being pursued on another front by R. Van Slyck, Indian Affairs' District Superintendent of Economic Development for the area:

> [Philip Desjarlais of the Piapot Band] mentioned the monies that the Federal and Provincial governments intend to spend in the Qu'Appelle, and felt some of this should be perhaps used to recover losses due to flooding. Since his visit here, I have found that those dollars were intended for the future development and improvement of the valley, as opposed to payment of losses due to flooding.
>
> As I see it at present, flood conditions will continue, and we perhaps should be thankful for water but at the same time can there not be something arranged, whereby other lands could be made available for hay, etc., (2,400 acres - Piapot) to replace those lands which has [sic] been lost to flooding.[296]

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[294] Minutes of meeting, "Damages Marshland Settlement," March 24, 1976, PFRA file 928/7E4-2, vol. 1 (ICC Documents, pp. 1006-07).

[295] W. Roy Wellman, Wellman & MacIsaac, Barristers & Solicitors, to W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, April 20, 1976, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 1011).

[296] R. Van Slyck, District Superintendent of Economic Development, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, to A.J. Gross, Acting Assistant Regional Director, Economic Development, Saskatchewan Region, Department of Indian and Northern Affairs, June 7, 1976, DIAND file 675/8-4, vol. 3 (ICC Documents, pp. 1017-18).

Van Slyck also suggested that the creation of a holding reservoir or lake on the Piapot or Muscowpetung reserves for recreational purposes might create considerable employment opportunities. A.J. Gross, Acting Assistant Regional Director of Economic Development, Saskatchewan Region, replied that Indian Affairs was prepared to entertain a proposal from the Bands, although he understood they had retained counsel and were preparing a submission to the PFRA.[297]

On July 14, 1976, representatives of Indian Affairs and the PFRA met in Regina to discuss the status of the claim:

> This situation so far as P.F.R.A. is concerned has not changed since their offer of settlement which was made some four years ago, to which they have received no response from the Bands. The Band Councils, by the way, who were involved were in fact invited to reply one way or the other, which they never did. It was assumed from this meeting, and agreed, that the next move would have to be by those persons involved namely, Pasqua and Muscowpetung Councils.
>
> Our feeling was unanimous in that we had to clear up one point, were the Bands waiting for us, or for the P.F.R.A., or were they employing the services of a legal firm. Mr. Markuson [Indian Affairs' Regional Supervisor of Lands, Saskatchewan Region] made an appointment with Mr. R. Wellman, who appeared to represent the two Bands in their effort to obtain a large claim as compensation for flood damages caused by the aforementioned structure.
>
> In discussion with Mr. Wellman, we were advised that he was in fact acting for the two Bands in respect to the one claim, that claim which resulted from the damage caused by the Echo Lake control structure. He is not acting for these Bands on any of the other land claims. The Federation of Saskatchewan Indians is not involved in the aforementioned claims either, but they are, as you know, involved with "Land Claims" as we know them.
>
> Mr. Wellman will be providing his first "draft" of his submission by July 23, this will not be as good a draft as he would like, but will get something started. He also assured us that there would be no further activities [for example, channelization] consented to upstream from Fort Qu'Appelle, until this one issue is settled.[298]

While anticipating receipt of the Bands' claim, Indian Affairs also felt pressure to secure a quick resolution of the matter. Other projects in the

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[297] A.J. Gross, Acting Assistant Regional Director, Economic Development, Saskatchewan Region, Department of Indian and Northern Affairs, to N.J. Bowering, District Lands and Resources Officer, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, June 18, 1976, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 1019).

[298] N.J. Bowering, District Lands and Resources Officer, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, to A.J. Gross, Acting Assistant Regional Director, Economic Development, Saskatchewan Region, Department of Indian and Northern Affairs, July 15, 1976, DIAND file F4320-9, vol. 1 (ICC Documents, pp. 1024-25).

Qu'Appelle Valley were being hampered as the Indians became increasingly unwilling to participate or cooperate while the flooding claims remained outstanding. As J.D. Leask, the Acting Director General for the Saskatchewan Region, commented:

> [T]he Bands affected have engaged legal council [sic] who will be presenting a claim shortly. We understand it will be for a large sum and based on social and economic deprivation that resulted from the loss of land flooded. . . .
>
> While no comments were made, it may be anticipated that our trust responsibility in not settling this matter or ever discussing it with the Bands (we see no evidence that it ever was discussed although obviously they were aware at the time), will be raised. We also anticipate that the interests already expressed by both Members of Parliament and the Saskatchewan Legislative Assembly will be utilized to support an early settlement especially in view of the need to control the floodwaters of the basin.[299]

As promised, Wellman delivered the claim on July 23, 1976. The Bands' demands were virtually identical to those set forth in Wellman's letter of July 28, 1975, but the claim for compensation had been quantified:

> In determining the appropriate principle or formula on which damages could be assessed it was the consensus of the Band Councils that they would accept the sum of $100.00 per acre for each acre that was actually flooded as a result of the erection of the dams.
>
> It would appear that by virtue of the records on file it is possible to determine with a fair degree of accuracy the exact acreage that were [sic] flooded. The information that I have, (this would be subject to confirmation by your Department), is that some 600 acres were flooded on the Muscowpetung Reserve and some 406 acres were flooded on the Pasqua Reserve and a lesser acreage on the Standing Buffalo Reserve and Piapot Reserve, particulars of which we do not have at this time.
>
> Accordingly, I have been authorized to advise your Department that my clients will accept settlement on the basis they will receive $100.00 an acre per acre flooded as a result of the erection of the dams. This amount would include the damages suffered by the Reserves insofar as reduction of the respective herds, resulting in radical changes in life style on the Reserves. Consequently, it meant that there was less food available, resulting in more people becoming welfare recipients than otherwise might have. Therefore, our position is that this will be inclusive compensation for any and all damages suffered for [sic] the Reserves with respect to this matter.[300]

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[299] J.D. Leask, Acting Director General, Saskatchewan Region, Department of Indian Affairs and Northern Development, to J.W. Ritchie, Acting Head, Lands Advisory Services, Department of Indian Affairs and Northern Development, July 16, 1976, DIAND file F4320-9, vol. 1 (ICC Documents, pp. 1026-27).

[300] W. Roy Wellman, Wellman & MacIsaac, Barristers & Solicitors, to W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, July 23, 1976, PFRA file 928/7E4-2, vol. 1 (ICC Documents, pp. 1029-30).

At $100 per acre, this proposal would have provided compensation somewhat in excess of $100,000. In a follow-up letter, Wellman added that the Bands' claim was supported by the Treaty Rights and Research Section of the Federation of Saskatchewan Indians.[301]

With this proposal in hand, the PFRA took further steps to quantify the claim. Planning Engineer E. Caligiuri calculated the acreages detrimentally affected by the construction of the Echo Lake dam, based on the following parameters:

> Elevation 1570 is the bottom elevation below which, under normal conditions without the structure, lands could not support production of hay or grazing. Elevation 1574 is the top elevation above which the structure has no detrimental effect on lands under production. This elevation includes an allowance of 1.6 feet for any capillary action which might occur.[302]

He concluded that the affected areas on the Muscowpetung, Pasqua, and Standing Buffalo reserves were 670 acres, 45 acres, and 50 acres, respectively. However, he found that the Piapot reserve was unaffected by the structure because the lowest elevation of the river banks on that reserve was six feet above elevation 1574.[303]

Wellman, Thomson, Peter Dubois of the Muscowpetung Band, and L.G. Ganne of the Department of Justice met in Regina on August 17, 1976. Wellman confirmed that his clients included Muscowpetung, Pasqua, and Standing Buffalo, but that Piapot had elected to proceed independently. Dubois agreed that Wellman was authorized to represent all three Bands, and affirmed that the negotiations could result in a final settlement. On the substantive issues, the parties appeared to agree that the Bands had never consented to the construction of the dam, but they differed on whether Indian Affairs had granted permission to proceed. Thomson noted that Indian Affairs had been fully informed of the project, and had negotiated and agreed on a damage settlement on behalf of the Bands.

With regard to quantifying the claim, Wellman confirmed that $100 per acre flooded constituted "an all-inclusive settlement for past and future damages." According to the minutes of the meeting, Thomson may have suggested that this figure was "an acceptable sum for settlement." However, the parties were unable to agree on the acreages of the areas flooded. Thomson referred to Caligiuri's figures of 670 acres and 45 acres for the Muscowpetung and Pasqua reserves, but indicated that he had no acreage for the Standing Buffalo reserve. Dubois countered that the affected area on the Pasqua reserve was more like 400 acres, and he suggested 40 to 50 acres for Standing Buffalo. To resolve this issue, the parties agreed to a joint engineering determination of the areas affected.[304]

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[301] W. Roy Wellman, Wellman & Macisaac, Barristers & Solicitors, to W.B. Thomson, Director, PFRA, Department of Regional Economic Expansion, July 28, 1976, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 1031).

[302] E. Caligiuri, Planning Engineer, Engineering Service, PFRA, Department of Regional Economic Expansion, to W.M. Berry, Chief Engineer, PFRA, Department of Regional Economic Expansion, August 4, 1976, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 1035).

[303] E. Caligiuri, Planning Engineer, Engineering Service, PFRA, Department of Regional Economic Expansion, to W.M. Berry, Chief Engineer, PFRA, Department of Regional Economic Expansion, August 4, 1976, PFRA file 928/7E4, vol. 5 (ICC Documents, pp. 1035-36).

After this meeting, the three Bands passed Band Council Resolutions requesting Indian Affairs "to have a survey done soon, to indicate what areas were in fact flooded as a result of the instalation [sic] and operation of the control structure at the lower end of Echo Lake in 1941 or 1942."[305] In forwarding the survey request to Regional Surveyor S.J. Zeldenrust, Markuson noted that the acreages had been estimated in an earlier engineering study, but "the bands are concerned that more acreage was flooded than originally anticipated."[306] Zeldenrust prepared a sketch showing the extent and acreage of lands flooded in the Muscowpetung reserve, but he commented that "it is difficult to determine the extent of the flooding as it fluctuates from year to year and one does not know, which year would be acceptable to both parties." He added that he would have similar plans prepared for the other two reserves if the one prepared for Muscowpetung was acceptable.[307]

Before the survey work could be completed, however, Wellman wrote to Ganne on November 19, 1976:

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[304] L.G. Ganne, Legal Advisor, Department of Justice, "Summary of Discussion Had at Meeting Held in the Office of W.B. Thomson, Director, PFRA, at 2:00 p.m., Tuesday, August 17, 1976," August 18, 1976, PFRA file 928/7E4, vol. 2 (ICC Documents, pp. 1039-41).

[305] M.R. St. Pierre, Acting District Superintendent of Economic Development, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, to A.H. Markuson, Regional Supervisor of Lands, Saskatchewan Region, Department of Indian and Northern Affairs, September 29, 1976, DIAND file E4320-06569 (ICC Documents, p. 1044); Pasqua Band, Band Council Resolutions 209 and 210, August 18 and 31, 1976, DIAND file E4320-06569 (ICC Documents, pp. 1042-43); Muscowpetung Band, Band Council Resolution 218, October 7, 1976, DIAND file E4320-06566 (ICC Documents, p. 1049). The Standing Buffalo BCR is not in evidence before the Commission but is referred to in M.R. St. Pierre, Acting District Superintendent of Economic Development, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, to A.H. Markuson, Regional Supervisor of Lands, Saskatchewan Region, Department of Indian and Northern Affairs, October 7, 1976, DIAND file E4320-06569 (ICC Documents, p. 1048).

[306] A.H. Markuson, Regional Supervisor of Lands, Saskatchewan Region, Department of Indian and Northern Affairs, to S.J. Zeldenrust, Regional Surveyor, Department of Energy, Mines and Resources, October 12, 1976, DIAND file E4320-06569 (ICC Documents, p. 1050).

[307] S.J. Zeldenrust, Regional Surveyor, Department of Energy, Mines and Resources, to N.J. Bowering, District Lands and Resources Officer, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, October 15, 1976, DIAND file E4320-06566 (ICC Documents, p. 1051).

> This is to further advise that the Chiefs in Council of the respective Reserves have indicated that they would be prepared to accept a lump sum settlement of $265,000.00 on the condition of course, that the appropriate releases would be signed with respect to past damages, present damages and anticipated future damages with respect to the structure.
>
> The reason why the Reserves have reached this decision was the fact that the general feeling is that the other alternatives will be one that will mean there will be considerable lapse of time before a settlement can be reached and also, there will be considerable expense.
>
> We would accordingly request that you review this matter with your appropriate superiors and in due course indicate to us whether or not a settlement can be proceeded with on that basis.[308]

Ganne quickly replied that the PFRA was not opposed to the idea of a lump-sum settlement, but it could not consider the figure proposed by Wellman without "substantiation and detailed information as to the basis on which this figure was arrived at." After outlining the process that had been agreed upon during the meeting of August 17, 1976 – $100 per acre as an all-inclusive settlement for past, present, and future damages, subject to a joint engineering determination of the number of acres affected – Ganne stated that Thomson was "wondering what happened to the furthering of this proposal which, it was felt by all concerned, would be the most effective method of bringing about an early settlement of this outstanding problem."[309]

In the first of two subsequent letters, Wellman simply advised Ganne that the Bands had held a further meeting during which they had agreed to accept a settlement on the basis set forth in his letter of November 19, 1976.[310] However, on December 8, 1976, he clarified the Bands' position:

> The respective Reserves have a felt position that has developed over the years as to the extent of the lands that were flooded. The positions have evolved by virtue of the information that has been given to them by the elders of the respective tribes and the information we have is that Muscowpetung had an acreage flood of about 1,500 acres, Pasqua 1,000 acres and Standing Buffalo from 50 to 100 acres.
>
> In discussing this matter with the representatives they have indicated to me that former Chief John Gambler of Muscowpetung is prepared to take an affidavit to this effect and one of the elder Peigans could take the affidavit with respect to Pasqua.

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[308] W. Roy Wellman, Wellman & MacIsaac, Barristers & Solicitors, to L.G. Ganne, Legal Advisor, Department of Justice, November 19, 1976, PFRA file 928/7E4, vol. 5 (ICC Documents, pp. 1053-54).

[309] L.G. Ganne, Legal Advisor, Department of Justice, to W. Roy Wellman, Wellman & MacIsaac, Barristers & Solicitors, November 19, 1976, PFRA file 928/7E4, vol. 5 (ICC Documents, pp. 1055-56).

[310] W. Roy Wellman, Wellman & MacIsaac, Barristers & Solicitors, to L.G. Ganne, Legal Advisor, Department of Justice, December 1, 1976, PFRA file 928/7E4, vol. 5 (ICC Documents, pp. 1057-58).

> Therefore, the position which we are putting to you is the position which the Reserves have a reasonable belief to be a correct one and this is corroborated by virtue of the fact that the lump sum settlement would be divided in accordance with the traditional position of the Reserves.[311]

Wellman stressed the importance of acting quickly:

> Accordingly, if the Department is prepared to act on the basis of the affidavits, we will arrange to get these affidavits to you as quickly as we can and once again we would like to reiterate that in the event the matter is not settled prior to February, there will be new Chiefs and Counsellors [sic] and I cannot assure you as to whether or not they will support our present position.[312]

After discussing the matter with Thomson, Ganne replied that the Bands' position was "totally unacceptable to the PFRA," particularly "the suggestion that consideration be given to affidavit evidence based on memory and reasonably [sic] belief designed to establish flooded acreage." Thomson was prepared to proceed only on the basis of the joint engineering arrangement previously agreed to by the parties.[313]

With his February deadline fast approaching, Wellman wrote directly to Berry, by then the Acting Director of the PFRA, to reiterate the Bands' willingness to settle for a lump sum of $265,000, subject to appropriate releases of past, present, and anticipated future damages.[314] The government relented, and steps to implement the settlement commenced.

Terms of the Settlement

The terms of the settlement appeared relatively straightforward. Of the proceeds of $265,000, Muscowpetung was to receive $150,000, Pasqua $100,000, and Standing Buffalo $15,000. The Bands were to provide the PFRA with appropriate releases and would authorize permits to allow future flooding.

Berry provided a memorandum to his superiors in the Department of Regional Economic Expansion so they could alert the Treasury Board of the

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[311] W. Roy Wellman, Wellman & MacIsaac, Barristers & Solicitors, to L.G. Ganne, Legal Advisor, Department of Justice December 1, 1976, PFRA file 928/7E4, vol. 5 (ICC Documents, pp. 1059-60).

[312] W. Roy Wellman, Wellman & MacIsaac, Barristers & Solicitors, to L.G. Ganne, Legal Advisor, Department of Justice December 1, 1976, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 1060).

[313] L.G. Ganne, Legal Advisor, Department of Justice, to W. Roy Wellman, Wellman & MacIsaac, Barristers & Solicitors, December 13, 1976, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 1061A).

[314] W. Roy Wellman, Wellman & MacIsaac, Barristers & Solicitors, to W.M. Berry, Acting Director, PFRA, Department of Regional Economic Expansion, January 24, 1977, PFRA file 928/7E4, vol. 5 (ICC Documents, pp. 1062-63).

PFRA's upcoming submission with regard to the settlement. After laying out the background to the claim and the proposed terms of settlement, Berry stated:

> Surveys completed by PFRA have shown that a total of 1,540 acres of reserve lands has been adversely affected by the Echo Lake control structure. Of this area, 935 acres are considered to have been productive hay lands before the lakes were raised. Based on studies of past damages (i.e. loss of production, access and developmental opportunities, shooting rights and shoreline erosion) and on the present market value of this land PFRA has concluded that the lump sum settlement of $265,000 can be justified.[315]

In advising Treasury Board of the proposed settlement, Assistant Deputy Minister J.D. Collinson suggested that "the most appropriate way of proceeding is by way of an ex gratia payment, since the settlement of the matter can be considered to fall in the category of moral obligation."[316]

On March 4, 1977, Wellman provided Berry with Band Council Resolutions from each of the three Bands "in trust and on the understanding that in due course the sum of $265,000.00 will be deposited in trust and to the credit of the respective Reserves to be divided in the proportion mutually agreed upon by the Reserves."[317] The terms of the Pasqua and Standing Buffalo resolutions were virtually identical:

> WHEREAS PFRA constructed a control structure on the Qu'Appelle River downstream of the outlet of Echo Lake in 1942; and
>
> WHEREAS the control structure raised the level of water in Echo Lake and in Pasqua Lake and as a consequence caused flooding of hay lands located within the boundaries of the Muscowpetung, Standing Buffalo and Pasqua Indian Reserves; and
>
> WHEREAS such flooding has resulted in a loss of hay production, a reduction of reserve lands previously available for hay production, a reduction of the number of cattle which the Bands were able to raise, and a consequential reduction of economic growth; and
>
> WHEREAS the Bands have never been paid compensation with respect to such losses;
>
> NOW, THEREFORE, BE IT RESOLVED that

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[315] W.M. Berry, Acting Director, PFRA, Department of Regional Economic Expansion, to M.W. White, Western Region, Department of Regional Economic Expansion, February 9, 1977, with attached notes entitled "Claim for Flooding Damages to Indian Lands, Echo Lake Dam, Qu'Appelle River," undated, PFRA file 928/7E4, vol. 5 (ICC Documents, pp. 1071-73).

[316] J.D. Collinson, Assistant Deputy Minister, Western Region, Department of Regional Economic Expansion, to J.D. Love, [Treasury Board], February 18, 1977, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 1075).

[317] W. Roy Wellman, Wellman & MacIsaac, Barristers & Solicitors, to W.M. Berry, Acting Director, PFRA, Department of Regional Economic Expansion, March 4, 1977, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 1077).

> for and in consideration of the payment of $100,000 [$15,000] to the credit of the Pasqua [Standing Buffalo] Band, the Band does hereby release PFRA from all past, present and future claims in respect to erection of the said control structure and consequential flooding, and further agrees to authorize the issuance of a permit to PFRA in respect of the continued operation of the said control structure.[318]

The Muscowpetung Band Council Resolution contained one significant difference. Rather than releasing the PFRA from all claims "in respect to erection of the said control structure and consequential flooding," the Muscowpetung resolution released all claims "in respect to lands now flooded by the said control structure."[319]

That same day, Berry forwarded the Band Council Resolutions and the formal Treasury Board submission to Collinson to commence the approval process.[320] The submission defended the settlement in these terms:

> A mutually acceptable lump sum of exactly $265,000 as full compensation for past and future damages has been negotiated between PFRA and the Indian Bands. Studies by PFRA have concluded that this sum is reasonable and justifiable on the following basis:
>
> Affected area – 1540 acres, consisting of 935 acres of hay lands and 605 acres of lower, marginal lands, on the three Reserves, within the vertical interval between the pre-dam long-term lake level and the elevation to which easements were purchased from non-Indian landowners.
>
> Unit values of compensation for damages to hay lands
> - $133 per acre, representing present value of lost returns to the land between 1943 and the present.
> - $125 per acre, representing the present value of future damages and being the current market value of this class of land.
>
> Unit value of compensation for damages to marginal lands
> - $40 per acre in consideration of damages to hunting and fishing capabilities, interference with access and loss of development opportunities along shorelines and on the Reserves generally.

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[318] Pasqua Band, Band Council Resolution, February 8, 1977, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 1069); Standing Buffalo Band, Band Council Resolution, February 8, 1977, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 1070).

[319] Muscowpetung Band, Band Council Resolution, February 15, 1977, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 1074).

[320] W.M. Berry, Acting Director, PFRA, Department of Regional Economic Expansion, to J.D. Collinson, Assistant Deputy Minister, Western Region, Department of Regional Economic Expansion, March 4, 1977, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 1076).

Total Compensation

Haylands – 935 acs. @ $258/ac =	$241,230
Marginal lands – 605 acs. @ $40/acre =	24,200
Total	$265,430[321]

After a minor procedural error was caught in the initial formal submission,[322] the PFRA resubmitted the documents to Treasury Board and, by Order in Council PC 1977-10/1949 dated July 7, 1977, the settlement received Cabinet approval.[323] On July 19, 1977, a copy of the Order in Council was forwarded to Berry,[324] and two days later Ganne provided a copy to J.D. Leask, by that date Indian Affairs' Director General for the Saskatchewan Region. Leask, who had previously concurred that the settlement was "fair and just,"[325] also acknowledged receipt of an Interdepartmental Settlement Advice in the amount of $265,000 payable to Indian Affairs.[326]

Berry himself notified Wellman of completion of the settlement:

> This is to advise you that we delivered today to the Department of Indian Affairs and Northern Development a check for $265,000 in settlement of the land claims on Pasqua Lake. A draft copy of the receipt of this cheque from that Department is attached hereto. This concludes our commitments on this matter.[327]

This was *not* the end of the matter, however.

Aftermath of the Settlement

By the autumn of 1977, Harry M. Hill had been appointed as the new Director of the PFRA and Berry had resumed his position has Chief Engineer. On October 21, 1977, Berry and Ganne met with new Muscowpetung Chief Ron Rosebluff, who had been in the position just ten days and who had questions regarding the settlement. In particular, Chief Rosebluff was concerned that

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[321] Department of Regional Economic Expansion, Submission to Treasury Board, March 23, 1977, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 1092).

[322] W.M. Berry, Acting Director, PFRA, Department of Regional Economic Expansion, to W. Roy Wellman, Wellman & MacIsaac, Barristers & Solicitors, May 5, 1977, PFRA file 928/7E4-2, vol. 1 (ICC Documents, p. 1103).

[323] Order in Council PC 1977-10/1949, July 7, 1977, PFRA file 928/7E4-2, vol. 1 (ICC Documents, p. 1104).

[324] R.G. Lagimodiere, Program Co-ordinator, Western Region, Department of Regional Economic Expansion, to W.M. Berry, Acting Director, PFRA, Department of Regional Economic Expansion, July 19, 1977, PFRA file 928/7E4-2, vol. 1 (ICC Documents, p. 1108).

[325] J.D. Leask, Director General, Saskatchewan Region, Department of Indian and Northern Affairs, to J.W. Ritchie, Head, Lands Advisory Services, Department of Indian and Northern Affairs, March 8, 1977, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 1078).

[326] L.G. Ganne, Legal Advisor, Department of Justice, to J.D. Leask, Director General, Saskatchewan Region, Department of Indian and Northern Affairs, July 21, 1977, PFRA file 928/7E4-2, vol. 1 (ICC Documents, p. 1109).

[327] W.M. Berry, Acting Director, PFRA, Department of Regional Economic Expansion, to W. Roy Wellman, Wellman & MacIsaac, Barristers & Solicitors, July 22, 1977, PFRA file 928/7E4-2, vol. 1 (ICC Documents, p. 1110).

"the $150,000 settlement allowed the flooding of their hay lands for ever and ever." After the history of the negotiations and the basis for the settlement had been explained to him, Chief Rosebluff expressed his intention to discuss the settlement with members of his Band to consider whether the Band should challenge the validity of the authorizing Band Council Resolution.[328]

In January 1978, Rosebluff advised Indian Affairs that the Muscowpetung Band did not intend to use or accept the $150,000 deposited in its revenue account. The Band disagreed with the wording since it released future claims and "gives P.F.R.A. any authority needed to raise or lower lake levels at their discretion." Rosebluff also indicated that the Band was prepared to go to court over the question of whether the resolution was null and void.[329] It should be noted, however, that, notwithstanding the suggestion that the Muscowpetung Band would not use or accept its share of the settlement proceeds, it is common ground between the parties to this inquiry that, by the date of these proceedings, all three Bands had in fact spent all or virtually all of the funds allocated to them.[330]

In a memorandum to his District Manager, Bowering, by this time the District Lands Administration Officer for the Touchwood File Hills Qu'Appelle District, suggested that carefully defining the area of the permit might satisfy the Band:

> Some assurance should be set forth to convince them that the established acres . . . would not be exceeded should the area again become flooded in the future and if the area was exceeded, then another claim for damages may result.
>
> It was my understanding that before any monies were paid out, that [sic] a permit arrangement was to be entered into covering the period upon which P.F.R.A. had flooding rights. I haven't seen this permit nor has anyone mentioned it again.
>
> While Mr. Len Ganne, legal advisor, worked, I assume, in close harmony with the Bands legal adviser, Wellman and McIssac [sic], it does not appear that the Muscowpetung Council is at all happy with the result. There may also be a conflict between this council and the council responsible for the settlement.[331]

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[328] W.M. Berry, Chief Engineer, PFRA, Department of Regional Economic Expansion, to Harry M. Hill, Director, PFRA, Department of Regional Economic Expansion, October 21, 1977, PFRA file 928/7E4-2, vol. 1 (ICC Documents, p. 1116).

[329] N.J. Bowering, District Lands Administration Officer, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, to J.D. Drummond, District Manager, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, DIAND file 675/8-4, vol. 4 (ICC Documents, pp. 1118-19).

[330] ICC Transcript, June 26, 1997, pp. 205-06 (Bruce Becker and David Knoll).

[331] N.J. Bowering, District Lands Administration Officer, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, to J.D. Drummond, District Manager, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, DIAND file 675/8-4, vol. 4 (ICC Documents, pp. 1118-19).

E. Korchinski, Director of Operations for the Saskatchewan Region, recommended that the permit be drafted and forwarded to the Band for its review.[332] On February 24, 1978, Lands Branch Director G.A. Poupore provided a draft permit to Korchinski for this purpose.[333]

At the time the settlement had been concluded in March 1977, M.R. St. Pierre, District Superintendent of Economic Development, had indicated that the "procedure is to arrange for a permit to be dated retroactive to 1942 to run continuous [sic] or as long as is required to control the levels of the Pasqua and Echo Lakes."[334] However, the initial draft permit provided for a commencement date of January 1, 1972, among the following terms:

> This letter shall be your authority, pursuant to the Indian Act to use and occupy for flooding purposes those parcels of land in Muscowpetung Indian Reserve No. 80, Hay Grounds Indian Reserve No. 80B, Pasqua Indian Reserve No. 79 and Standing Buffalo Indian Reserve No. 78 shown on the sketches attached hereto.
>
> This permit is granted subject to the following terms and conditions:
>
> 1. That this permission or permit shall be valid for an indeterminate period commencing from January 1, 1972 and for as long as the land is required for flooding purposes.
> 2. That the Department of Regional Economic Expansion shall pay, on execution hereof, the sum of $265,000 as full and final payment for the use of the said land for the duration of this permit.
> 3. That the land shall be used only for the purpose of flooding occasioned by the construction and operation of the Echo Lake Dam.
> 4. That the Department of Regional Economic Expansion shall be solely liable for any actions, demands, damages or claims arising from, under or in respect of its use of the aforesaid land.[335]

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[332] E. Korchinski, Director of Operations, Saskatchewan Region, Department of Indian and Northern Affairs, to G.A. Poupore, Director, Lands Branch, Department of Indian and Northern Affairs, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 1123).

[333] G.A. Poupore, Director, Lands Branch, Department of Indian and Northern Affairs, to E. Korchinski, Director of Operations, Saskatchewan Region, Department of Indian and Northern Affairs, February 24, 1978, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 1124).

[334] M.R. St. Pierre, District Superintendent of Economic Development, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, to A.H. Markuson, Regional Lands Administrator, Saskatchewan Region, Department of Indian and Northern Affairs, March 8, 1977, DIAND file E4320-06566 (ICC Documents, p. 1079).

[335] R.D. Brown, Assistant Deputy Minister – Programs, Department of Indian and Northern Affairs, to J.D. Love, Deputy Minister, Department of Regional Economic Expansion, undated, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 1087). This document was never signed.

In providing the draft permit to Korchinski, Poupore noted that "[t]he sketches mentioned in the permit are those prepared by the Regional Surveyor's office, signed, dated October 1976, April 1977 and January 1978 and are *not attached*."[336]

It is important to emphasize that this draft permit was never signed, but it still included two key facets that have become pivotal to the issues in this inquiry:

- In clauses 1 and 3, it provided for an "indeterminate" term "for as long as the land is required for flooding purposes," with the land to be used "only for the purpose of flooding occasioned by the construction and operation of the Echo Lake Dam."
- It referred to *attached* sketches that specified the land to be subject to the permit, but the sketches were not attached.

On February 13, 1978, the Muscowpetung Band Council passed a resolution purporting to rescind the 1977 resolution by which the previous Band Council had accepted the settlement. The rescinding resolution stated:

> 1. That the Muscowpetung Band Council deems the land flood situation to be a matter requiring a conditional surrender persuant to Sec. 37 and Sec. 38 of the Indian Act.
> 2. That the Band Council views the settlement non-constitutional on the basis that it is non-advisable and not proper to enter into an agreement of perpetuity.
> In the Alternative:
> 3. That such a settlement, if not subject to Sec. 37 and Sec. 38; that it should and could only be approved by the electors of the Muscowpetung Band or at least by a majority of a Band Council in a properly constituted meeting.
>
> It is with the above points in mind that we rescind the previous B.C.R. file #225 and are therefore seeking further negotiations.[337]

On receiving this Band Council Resolution, Korchinski forwarded it to Poupore, asking whether the authorizing Order in Council had been passed and what Indian Affairs' position would be. Although his Minister, J. Hugh Faulkner, had initially expressed sympathy for the Band's stance that the settlement amounted to an illegal surrender,[338] Poupore in his response to Korchinski on March 29, 1978, did not:

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[336] G.A. Poupore, Director, Lands Branch, Department of Indian and Northern Affairs, to E. Korchinski, Director of Operations, Saskatchewan Region, Department of Indian and Northern Affairs, February 24, 1978, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 1124). Emphasis added.

[337] Muscowpetung Band, Band Council Resolution, February 13, 1978, DIAND file 675/8-4, vol. 4 (ICC Documents, p. 1122).

> The Muscowpetung Band Council has evidently misinterpreted the provision of the *Indian Act*. In this case a surrender of land is not appropriate as the Department would be unable to lease to the Department of Regional Economic Expansion. In view of this, a permit is the appropriate vehicle and a draft permit was forwarded to you on February 20, 1978. The Muscowpetung Band Council is in error in stating that the settlement proposed is not constitutional. The settlement was sanctioned by the Band Council of the day and was negotiated between the Band's solicitors, Mr. R. Wellman and Mr. L.G. Ganne, of the Department of Justice. The proposed permit is not in perpetuity as the Band Council states, but will permit the land to be used by D.R.E.E. for flooding purposes as required. The proposal was negotiated with the approval of the Band Council of the day and there was no requirement for the Council to put it before the Band members.
>
> It is noted that the Band has received $150,000.00, the monies agreed in the negotiations with D.R.E.E. It is considered therefore that as the agreement was properly negotiated with D.R.E.E. and that the monies agreed to have been paid to Muscowpetung Band funds we cannot agree with the proposal put forward by the new Band Council in their B.C.R. dated February 13, 1978.[339]

At this point, a letter from Marcel Lessard, the Minister of Regional Economic Expansion, had been drafted to convey the same sentiments to the Band. However, with a view to heading off the problem, Markuson instructed Touchwood File Hills Qu'Appelle District Manager J.D. Drummond to meet with the Band to explain the draft permit:

> When reviewing the draft permit with the Band Council you should be prepared to clarify why a surrender was not necessary. That the proposed settlement was approved by the Band Council. That the Bands had received the monies and all that remained was to provide a letter permit outlining the right to use and occupy the lands flooded by the erection of the Echo Lake Dam built in 1952.
>
> This does not grant any flooding beyond that affected by the level of the dam.[340]

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[338] J.R. Lane, Director General, Saskatchewan, Department of Regional Economic Expansion, to Harry Hill, Director, PFRA, Department of Regional Economic Expansion, March 22, 1978, DIAND file 675/8-4, vol. 4 (ICC Documents, p. 1132).

[339] G.A. Poupore, Director, Lands Branch, Department of Indian and Northern Affairs, to E. Korchinski, Director of Operations, Saskatchewan Region, Department of Indian and Northern Affairs, March 29, 1978, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 1133).

[340] A.H. Markuson, Supervisor of Lands, Saskatchewan Region, Department of Indian and Northern Affairs, to J.D. Drummond, District Manager, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, April 6, 1978, DIAND file E4320-06566 (ICC Documents, p. 1137).

Drummond's efforts obviously did not have the desired effect, as Lessard's letter went out on May 2, 1978:

> You indicated your concern that surrender of Indian lands could be interpreted as being part of the agreement. Our legal advisor states this interpretation cannot be substantiated.
>
> It was never contemplated by the staff of my Department that surrender of lands would be part of the agreement, and, with the supporting opinion of our legal advisor, let me assure you that such an interpretation cannot legitimately be made. Insofar as land use is concerned, the agreement only makes provision for an appropriate permit to be granted pursuant to Section 28, Subsection (2) of the Indian Act.
>
> With regard to your concern over waiving of future claims, the agreement precludes claims against the Crown, or any future owner of the water control structure, resulting from the continued existence and operation of the structure in its present form, but does not preclude future claims arising from other activities that might adversely affect your Reserve lands.[341]

Indian Affairs Minister Faulkner sent a similar letter to Chief Rosebluff on July 11, 1978.[342]

Both letters prompted immediate and vigorous replies from the Band's newly retained solicitor, William J. Pillipow. To Lessard, Pillipow wrote:

> [W]e cannot agree with you or with the opinion of your legal advisor with respect to interpretation that must be placed as to how a settlement of this type can be effectively agreed to by a Band. Section 28, subsection 2 of the Indian Act referred to a permit being issued by the Minister for a one year period only. As a result that Section cannot grant the rights to the Minister which you assert. We wish to bring to your attention Section 37 of the Indian Act, which says that Indian land cannot be dealt with as set out therein except as provided under Sections 37, 38 & 39.
>
> Furthermore, we cannot agree at all that a Band can forever waive its rights to flooding of their lands without eliminating [sic] the right of the land to future generations. It is our opinion that The Band can settle a claim for damages which occurred in the past but certainly cannot bind their future generations without complying with Sections 37, 38 & 39 of the Indian Act.[343]

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[341] Marcel Lessard, Minister, Department of Regional Economic Expansion, to Ron Rosebluff, Chief, Muscowpetung Band, May 2, 1978, PFRA file 928/7E4-2, vol. 1 (ICC Documents, p. 1145).

[342] J. Hugh Faulkner, Minister, Department of Indian and Northern Affairs, to Ron Rosebluff, Chief, Muscowpetung Band, July 11, 1978, PFRA file 928/7E4-2, vol. 1 (ICC Documents, p. 1155).

[343] William J. Pillipow, Pillipow, Kolyk & Owen, Barristers & Solicitors, to Marcel Lessard, Minister, Department of Regional Economic Expansion, May 17, 1978, PFRA file 928/7E4-2, vol. 1 (ICC Documents, p. 1148).

In his letter to Faulkner, Pillipow added that "the agreement which was entered into with DREE and PFRA could be held to be null and void based on alienation."[344]

Lessard's reply reiterated his earlier comments that it had not been intended by the settlement to dispose of an interest in land such that the surrender provisions of section 37 of the *Indian Act* would be triggered:

> It was our intention simply to acquire the right to maintain the existing control structure, built by PFRA in 1942, at its present location, and further, to compensate the Band for the past, present and future consequences of any flooding that might result from the continuing existence of this structure.
>
> This is certainly not an alienation of these lands so far as the Band is concerned, inasmuch as flooding may or may not occur from year to year. The extent of flooding in any year will be determined primarily by natural causes, and flooding of the low-lying land concerned could occur whether or not the PFRA control structure existed.
>
> Section 28(2) authorizes the Minister of Indian Affairs and Northern Development to grant by permit, for any period longer than one year, with the consent of the Band Council, the right to occupy or use a reserve. This is the right that we were seeking with respect to the control structure. The permit was intended to be limited in its application to this structure and was not intended to provide any rights in relation to reserve land adjoining the structure.
>
> The February 15, 1977 Band Council Resolution, which the Band adopted, acknowledged that the payment to be made to the credit of the Band was for past, present and future claims in respect of flooding, with no suggestion that the acquisition of any interest in land was acquired thereby. It further expressed agreement on behalf of the Band to consent, in effect, to the Minister's granting a permit to PFRA for access on the Reserve to maintain its structure, which had been located there since 1942.
>
> As indicated above, one of the purposes of the Band Council Resolution was to convey the consent of the Council to the Minister authorizing him to grant a permit to cover the existence of the control structure for a period in excess of the one year to which he is limited without the benefit of Council consent. This is a situation falling completely within the purview and intent of Section 28(2) and clearly does not contemplate a disposition of reserve land within the meaning of Section 37, which necessitates a surrender.
>
> Furthermore, in our opinion, the Band has not waived its right to the flooding of their land. The Band has agreed to a negotiated amount as settlement for the effects of flooding in the past, present and future, which they, at the time of negotiated settlement, adopted by a Band Council Resolution.
>
> This is an agreement that has been fully performed by the payment of the agreed amount of consideration and which is not capable of being disturbed simply by a

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[344] William J. Pillipow, Pillipow, Kolyk & Owen, Barristers & Solicitors, to J. Hugh Faulkner, Minister, Department of Indian and Northern Affairs, July 26, 1978, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 1157).

> subsequent Council deciding to rescind the previous Band Council Resolution, which expressed the consent of the Band to the agreement.[345]

Assistant Deputy Minister R.D. Brown of Indian Affairs followed with a similar letter to Pillipow.[346] However, notwithstanding the official position taken by Canada in the correspondence with the Band's solicitors, Indian Affairs was uncertain about its ability to issue a permit under subsection 28(2), and Korchinski stated that "it is on this basis the permit has not been issued."[347]

The matter appears to have languished for a year until Chief Rosebluff brought it up again during a meeting with Owen A. Anderson, the Saskatchewan Region Director General, on June 20, 1979, following an unusually high spring runoff. In a follow-up letter dated July 9, 1979, Anderson assured Chief Rosebluff that the 1977 Band Council Resolution did not deal with damages that might be caused by additional dams, and he provided the Chief with topographic surveys prepared by the Regional Surveyor to define the area and the acreage flooded. He asked Chief Rosebluff to review the draft permit "and advise if you see anything that does not conform to the structure nor the compensation that your Band's previous council negotiated." He concluded by noting that Indian Affairs believed that the Department of Regional Economic Expansion had "acted in good faith in securing the Treasury Board approve [sic] the compensation that had been negotiated by your solicitor, Mr. Wellman."[348]

Despite Anderson's cajoling, he had to report to Leask that "Chief R. Rosebluff is not very happy with Headquarters [sic] response and is insisting that the Department should explore all possible means to get the Band out of this commitment." Anderson asked Leask to reconsider the Department's opinion of March 29, 1978, in which Poupore had supported the PFRA's position.[349] In a separate memorandum, to satisfy an undertaking given by the Minister to Chief Rosebluff, Assistant Deputy Minister Brown also asked Leask to look into the legality of the February 15, 1977, Band Council Resolution in terms of "concluding the arrangement with PFRA."[350]

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[345] Marcel Lessard, Minister, Department of Regional Economic Expansion, to William J. Pillipow, Pillipow, Kolyk & Owen, Barristers & Solicitors, August 1, 1978, DIAND file 675/8-4, vol. 3 (ICC Documents, pp. 1159-61).

[346] R.D. Brown, Assistant Deputy Minister – Programs, Department of Indian and Northern Affairs, to William J. Pillipow, Pillipow, Kolyk & Owen, Barristers & Solicitors, September 12, 1978, PFRA file 928/7E4-2, vol. 1 (ICC Documents, pp. 1163-64).

[347] E. Korchinski, Director of Operations, Saskatchewan Region, Department of Indian and Northern Affairs, to M. Irene Lane, Acting Chief, Departmental Secretariat, Department of Indian and Northern Affairs, August 15, 1978, DIAND file 675/8-4, vol. 4 (ICC Documents, p. 1162).

[348] Owen A. Anderson, Director General, Saskatchewan Region, Department of Indian and Northern Affairs, to Ronald Rosebluff, Chief, Muscowpetung Band, July 9, 1979, DIAND file E4320-06566 (ICC Documents, pp. 1169-70).

[349] Owen A. Anderson, Director General, Saskatchewan Region, Department of Indian and Northern Affairs, to J.D. Leask, Director General, Reserves and Trusts, Department of Indian and Northern Affairs, July 17, 1979, DIAND file 675/8-4, vol 4 (ICC Documents, p. 1171).

Leask responded by asking Anderson for additional information:

> To support the Band in this problem, we require, as soon as possible, the following information:-
>
> 1. Were individual Band members consulted or made aware of the proposal and B.C.R. 225 prior to it passing? Was the B.C.R. signed by a quorum of this Band at a regular meeting?
> 2. Did the Band have Departmental assistance in its negotiations with D.R.E.E.? It is noted that a Mr. Wellman was appointed by the Bands.
> 3. It is noted that B.C.R. 225 is identical to B.C.R.'s prepared by the Pasqua and Standing Buffalo Bands for a similar purpose. Were these B.C.R.'s drafted by the Bands, D.R.E.E. or this Department?
> 4. When were the monies paid by D.R.E.E. to the Band?
>
> In addition it is requested that you meet with D.R.E.E. at an early date and ascertain their views on re-negotiating the agreement reached between D.R.E.E. and the Band.[351]

Markuson drafted the response for Anderson:

> 1. Doubtful if Council consulted band members. Signed by quorum. Not likely at band meeting but at lawyer's office.
> 2. No, we were not involved. Attended a meeting with Wellman, and we were advised to stay out of the process as he could provide better emotional objectives.
> 3. District or Region did not draft thè BCR. Expect Wellman did.
> 4. Funds were paid to Revenue Trust Fund.[352]

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[350] R.D. Brown, Assistant Deputy Minister – Programs, Department of Indian and Northern Affairs, to J.D. Leask, Director General, Reserves and Trusts, Department of Indian and Northern Affairs, July 27, 1979, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 1175).

[351] J.D. Leask, Director General, Reserves and Trusts, Department of Indian and Northern Affairs, to Owen A. Anderson, Director General, Saskatchewan Region, Department of Indian and Northern Affairs, August 2, 1979, DIAND file E4320-06566 (ICC Documents, p. 1176). In fact, as already noted, the Muscowpetung Band Council Resolution was *not* identical to the Band Council Resolutions passed by the Pasqua and Standing Buffalo Bands.

[352] A.H. Markuson, Director, Lands and Membership, Saskatchewan Region, Department of Indian and Northern Affairs, to Paul Jaiswal, Community Affairs, Department of Indian and Northern Affairs, August 8, 1979, DIAND file E4320-06566 (ICC Documents, p. 1177).

It should be noted that Markuson's view that Wellman had prepared the Band Council Resolution contradicted an earlier statement by Chief Rosebluff that Ganne was the draftsman.[353]

Indian Affairs continued to deal with the Muscowpetung Band to try to make the settlement work. On September 14, 1979, the Band issued a new Band Council Resolution that, in consideration for the $150,000 payment already received, purported to release the PFRA from only past and present claims – the previous reference to future claims was conspicuously absent – and to permit the PFRA to continue to flood an area of 671.1 acres.[354] In conjunction with this resolution, Assistant Deputy Minister Brown forwarded a second draft permit to his counterpart, J.D. Collinson, in the Department of Regional Economic Expansion. This permit was identical to the earlier draft, except that it applied only to the Muscowpetung Band and purported to grant permission to flood the same 671.1 acres referred to in the Band's new Band Council Resolution.[355]

This limitation on the flooded areas was unacceptable to Collinson:

> Your letter refers to certain parcels of land to which the permit applies, and in supporting Band Council Resolution No. 295, these parcels are particularly identified and total 671.1 acres.
>
> A Muscowpetung Band Council Resolution (copy attached for your information) dated February 15, 1977, which resulted from our negotiations with the Indian Band, identifies the area involved as "... lands now flooded by the said control structure ...." On this basis, Treasury Board authority for the $150,000 settlement was granted, and the subsequent Order in Council, P.C. 1977-10/1949, authorized compensation for "... lands bordering Pasqua and Echo Lakes required as a result of the construction in 1942-43 of a dam at the outlet of Echo Lake on the Qu'Appelle River ...."
>
> At the time of negotiations with the Band, an engineering review indicated that under certain circumstances approximately 1,190 acres (lands below elevation 1,574 feet) could be affected by flooding from the existing control structure. Our negotiations with the Band and our request for Treasury Board and Order in Council authority were based on this premise. With this as background, you will see that the limita-

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[353] N.J. Bowering, District Lands Administration Officer, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, to J.D. Drummond, District Manager, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, January 4, 1978, DIAND file 675/8-4, vol. 4 (ICC Documents, p. 1118).

[354] Muscowpetung Band, Band Council Resolution, September 14, 1979, PFRA file 928/7E4-2, vol. 1 (ICC Documents, p. 1179).

[355] R.D. Brown, Assistant Deputy Minister – Programs, Department of Indian and Northern Affairs, to J.D. Collinson, Assistant Deputy Minister, Western Region, Department of Regional Economic Expansion, October 12, 1979, PFRA file 928/7E4-2, vol. 1 (ICC Documents, p. 1181).

> tions imposed by your letter and by Band Council Resolution No. 295 on land that could be affected by the Echo Lake Dam are at variance with our negotiated position.
>
> In summary, the Band Resolution of 15th February, 1977 . . . is the true and legitimate basis for the payment of the $150,000 to the credit of the Muscowpetung Band. The permit must be granted on the same basis.[356]

To this, Brown replied:

> The purpose of our October 12 letter was to implement the agreement reached between your officers and the Muscowpetung Band to allow PFRA to use lands flooded in 1977 as a result of the construction of a dam at the outlet of Echo Lake on the Qu'Appelle River. The Chief of the Band has been concerned that a general permit for flooding would grant PFRA unrestricted right to flood reserve lands without the Band having any recourse for future damages arising from these actions. Accordingly, it was agreed that the permit should cover those areas flooded in 1977 and covered by the February 15, 1977 Band Council Resolution which states: . . . . claims in respect to lands *now* flooded by the said control structure . . . .
>
> The acreages and plans were drawn up by the Regional Land Surveyor for the Department of Energy, Mines and Resources.
>
> Since the 1977 flooding arrangement appears to have been negotiated directly between your officers and the Band, we are not privy to the full extent of the points agreed upon. However, we would be reluctant to change the description of the lands covered by the permit area without the concurrence of the Muscowpetung Band. If you are not satisfied with the area described in the October 12 permit, I suggest you arrange a meeting with the Band Council and our Regional officers to discuss the matter.[357]

Collinson then took the matter up with J.D. Nicholson, the Indian Affairs' Assistant Deputy Minister for Indian and Inuit Affairs:

> It would appear that while your Department may be under some pressure from a new Chief to change the settlement terms, there is little or no choice but to accept the settlement entered into and as authorized by Order in Council P.C. 1977-10/1949, dated July 7, 1977. This Order in Council relates to [Treasury Board] Minute 749611, which confirmed the settlement agreed upon, established a total number of acres on three Reservations considered affected by the PFRA Echo Lake Dam, and set the compensation to be paid per acre on such affected areas. The agreement with the Muscowpetung Band, and two other Bands which were also involved in the negotiations,

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[356] J.D. Collinson, Assistant Deputy Minister, Western Region, Department of Regional Economic Expansion, to R.D. Brown, Assistant Deputy Minister – Programs, Department of Indian and Northern Affairs, October 26, 1979, PFRA file 928/7E4-2, vol. 1 (ICC Documents, pp. 1183-84).

[357] R.D. Brown, Assistant Deputy Minister – Programs, Department of Indian and Northern Affairs, to J.D. Collinson, Assistant Deputy Minister, Western Region, Department of Regional Economic Expansion, December 4, 1979, PFRA file 928/7E4-2, vol. 1 (ICC Documents, pp. 1185-86).

did not provide a breakdown of the exact acreage on each Reserve affected by the flooding. The Bands agreed among themselves as to allocation of monies, and the allocation was also confirmed and authorized by the Treasury Board Minute.

Because of the difficulties or near impossibility of precisely establishing the number of acres that could be flooded or otherwise affected on each Reserve by the PFRA control structure, and to bring finality to a long-standing claim, the Bands, through their lawyer, and the Crown, each agreed on a straight lump-sum payment which the Bands would allocate among themselves. This agreement was reflected in the Band Council Resolutions passed by each of the three Bands subsequent to agreement on the settlement proposals. The Crown by Order in Council confirmed the settlement. . . .

It is evident from engineering computations of the area affected by the Echo Lake Dam that the acreage calculated to be affected by the structure on the Muscowpetung Reserve is substantially larger than the acreage set out in B.C.R. 295, dated September 14, 1979, on which Mr. Brown relies. In my letter of October 24, 1979, I have already indicated that this acreage is at variance with our negotiated position and that it was not intended that the settlement be made on a precise acreage basis.

The following points seem pertinent to this situation:

- Both DIAND and DREE-PFRA are branches of the government for purposes of administration. The settlement was made between the Crown on the one part and the three Bands on the other. Both Departments are bound by the settlement on the side of the Crown. The Bands represented throughout by the lawyer of their choice are also bound by the settlement, having accepted and received full payment of the settlement monies.
- The Deputy Attorney General is solely (through his agents) authorized and entitled to effect settlement and compromises of claims for and against the Crown. The present case, being a claim by the Bands against the Crown for flooding damages, was settled by agreement between the Crown as represented by the Deputy Attorney General and by the Bands represented by their lawyer. In settling the Bands' claims, the Deputy Attorney General was acting for both DIAND and DREE.
- An Order in Council, being the act of the Executive, has authorized the settlement on behalf of the Crown and has provided for the monies in payment of the settlement agreement. This Order in Council sets out a total acreage which is the acreage agreed upon as being affected, and sets forth the price to be paid per affected acre. Needless to say, the words "now flooded" contained in B.C.R. dated February 12, 1977, refer to the flooding caused by the control structure at any time and do not mean flooding as it existed on February 12, 1977.
- Mr. Brown's suggestion that PFRA originate another meeting to renegotiate with one of the three Bands a settlement already agreed upon by the Deputy Attorney General on behalf of the Crown and authorized by the Executive is not practical, and in fact would not be acceptable.

With the above as background, it would seem desirable to review the permit which was incorporated in Mr. Brown's letter of October 12, with particular attention to

> removing acreage limitations related to consequential flooding by the PFRA structure.[358]

When after several inquiries the PFRA had not yet received its permit by August 20, 1981, Hill asked Murray R. Skelton, the Manager of Land Administration, to follow up.[359] Skelton did so by providing for Hill's review a draft memorandum to Deputy Minister Robert C. Montreuil to propose that he write directly to Paul Tellier, Indian Affairs Deputy Minister, to request the permit. The memorandum stated in part:

> To date a reply to Mr. Collinson's letter [dated March 28, 1980] has not been received.
>
> It is now essential to acquire a permit to flood, which is consistent with the negotiated terms of the 1977 settlement. Failure to obtain same and as soon as possible is leaving PFRA vulnerable to such diverse and contemplated claims as economic and environmental damages, adverse social and cultural effects and rehabilitative costs, etc.[360]

Eventually, a letter requesting a permit went out over Montreuil's signature to Tellier on January 4, 1982.[361]

Assistant Deputy Minister Donald K. Goodwin finally replied on Tellier's behalf in a letter dated May 7, 1982, to Collinson. Goodwin attributed the delay in responding to the time spent by Indian Affairs to examine the situation, but even after this close scrutiny Goodwin's response was not what the Department of Regional Economic Expansion had been hoping to hear:

> As your Department is aware, the three new Chiefs and Councils of the Bands involved in the issue have expressed their dissatisfaction to DIAND that the cash settlement of 1978, consented to by the previous Chiefs and Band Councils, was unjust. In view of this allegation, I believe it will be advisable to seriously consider a renegotiation of certain points in your agreement with the Bands prior to the issuance of any

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[358] J.D. Collinson, Assistant Deputy Minister, Western Region, Department of Regional Economic Expansion, to J.D. Nicholson, Assistant Deputy Minister, Indian and Inuit Affairs, Department of Indian and Northern Affairs, March 28, 1980, PFRA file 928/7E4-2, vol. 2 (ICC Documents, pp. 1191-93).

[359] H.M. Hill, Director General, PFRA, Department of Regional Economic Expansion, to D.H. Brannen, Chief, Administration and Program Service, Department of Regional Economic Expansion, August 20, 1981, PFRA file 928/7E4-2, vol. 2 (ICC Documents, p. 1218).

[360] J.D. Collinson, Assistant Deputy Minister, Western Region, Department of Regional Economic Expansion, to Robert C. Montreuil, Deputy Minister, Department of Regional Economic Expansion, undated draft, PFRA file 928/7E4-2, vol. 2 (ICC Documents, p. 1222).

[361] Robert C. Montreuil, Deputy Minister, Department of Regional Economic Expansion, to Paul Tellier, Deputy Minister, Department of Indian Affairs and Northern Development, January 4, 1982, PFRA file 928/7E4-2, vol. 2 (ICC Documents, pp. 1223-24).

> permits to your Department. To issue these permits against the expressed wishes of the current Band Councils may lead to serious repercussions.[362]

On this note, correspondence between the two Departments on the subject ceased.

CREATION OF QU'APPELLE VALLEY INDIAN DEVELOPMENT AUTHORITY

While the Departments haggled over the terms of the permits, the Indian Bands of the Qu'Appelle Valley had been taking steps to better present their claims with a unified voice. On June 20, 1979, the Chiefs of the eight Bands passed a unanimous resolution to form QVIDA, with Chief Roland Crowe of the Piapot Band as the organization's first President. The primary concerns that QVIDA's members sought to address were:

- perceived violations of their rights, including unfulfilled treaty land entitlements, reduced treaty and riparian water rights, deterioration of the visual environment and water quality, loss of sources of livelihood, displacement of Band members to urban centres, inadequate resources to protect rights and develop reserve economies, and, of particular interest in this inquiry, damages to land and improvements caused by water level control decisions; and
- the future role of Qu'Appelle Valley Bands in maintaining, shaping, and directing the local economy, land use, Indian culture and history, and the water regime.

In particular, the organization intended to work towards more effective flood control and improved water quality in the Qu'Appelle Valley. It also pledged to document, verify, and assess historical flooding damages to reserve lands, and to seek retroactive compensation for those damages.[363]

To this end, on October 9, 1980, Chief Crowe advised Rabi Alam, Indian Affairs' Director of Regional Planning, that the Muscowpetung, Pasqua, and

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[362] Donald K. Goodwin, Assistant Deputy Minister, Indian and Inuit Affairs, Department of Indian and Northern Affairs, to J.D. Collinson, Assistant Deputy Minister, Western Region, Department of Regional Economic Expansion, May 7, 1982, PFRA file 928/7E4-2, vol. 2 (ICC Documents, p. 1244).

[363] Qu'Appelle Valley Indian Development Authority, "Directional Plan 1979-1983," October 1979, pp. 5-6 and 9 (ICC Exhibit 1).

Standing Buffalo Bands intended to rescind their 1977 Band Council Resolutions. He continued:

> In view of the above, there is no way the P.F.R.A. can continue to flood Indian lands within the Qu'Appelle until this matter is settled. The P.F.R.A. permit would be useless in this regard. The Qu'Appelle Valley Indian Development Authority is the negotiating mechanism for these Bands.[364]

At a subsequent meeting between QVIDA representatives and Indian Affairs' regional management team, Chief Crowe made a further statement:

> Chief Crowe advised that before any Indian lands are surrendered a band referendum is required. This was never done in the case of three Qu'Appelle Bands allowing P.F.R.A. to flood their lands. As a result these three bands are now rescinding their Band Council Resolutions. Regardless of a band referendum being held one does not have the right to surrender land for more than one year.[365]

Chief Crowe later quantified the damage claim as a lump sum of $10.5 million, coupled with annual "flooding lease" payments of $500,000 to be adjusted for inflation.[366]

On being advised by Chief Crowe of the three Bands' intent to rescind their 1977 Band Council Resolutions, Alam requested background information. Markuson replied:

> I would like to point out that the three bands involved engaged their own lawyer, R. Wellman, who did the negotiations with DREE. *When we attended the meeting with Mr. Wellman we were informed that the Department should stay out of the negotiations as he could plead better using the tangible and intangible losses where we would be more inclined to use land value only. Therefore the Department did not get involved.* Wellman acquired the B.C.R.'s and agreement, Justice reviewed the proposal and Treasury Board approved the expenditure of $265,000.
>
> No permit is required under Section 28 as it only requires a letter of agreement between the two Ministers.[367]

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[364] Chief Roland Crowe, President, Qu'Appelle Valley Indian Development Authority, to Rabi Alam, Director, Planning and Review, Saskatchewan Region, Department of Indian and Northern Affairs, October 9, 1980, DIAND file E4320-06566 (ICC Documents, p. 1202).

[365] Qu'Appelle Valley Indian Development Authority, Minutes of meeting with [Indian Affairs] Regional Management Team, November 17, 1980, DIAND file E4320-9, vol. 1 (ICC Documents, p. 1209).

[366] Memorandum to file, M.R. Skelton, Manager, Land Administration, Department of Indian and Northern Affairs, April 5, 1982, PFRA file 928/7E4-2, vol. 2 (ICC Documents, p. 1243).

[367] A.H. Markuson, Director, Lands and Membership, Saskatchewan Region, Department of Indian and Northern Affairs, to Rabi Alam, Director, Planning and Review, Saskatchewan Region, Department of Indian and Northern Affairs, October 23, 1980, DIAND file E4320-06566 (ICC Documents, p. 1204). Emphasis added.

On November 10, 1980, the Standing Buffalo Band issued its rescinding Band Council Resolution.[368]

Four months later, the QVIDA Chiefs met with Leask to address their grievances with regard to valley flooding and to implore Indian Affairs not to issue permits to the PFRA. Leask noted:

> They were anxious that no permits be issued to DREE in respect to the developments in the valley until further discussion had taken place and I advised them that I was not aware of any intention on our part to issue permits immediately and that we would want to support the Band in discussions which they had if they were successful in re-opening them.[369]

However, it is apparent that a new permit had already been sent to the Department of Regional Economic Expansion, although it is not clear whether it was the permit of October 12, 1979, that sparked the exchange between Assistant Deputy Ministers Brown and Collinson or yet another draft permit. Markuson commented to Alam:

> I was not aware that a new permit had been sent to DREE. I believe that they have firm grounds for including future flooding as that was the whole intent of the structure to hold and release flood waters.
>
> If the entire valley problem is looked at, the Bands of the valley may well have a case against the Federal Government for allowing development to take place that has led to the accessive [sic] flooding of the reserve lands. Other control structures are involved. I doubt if the matter will be settled any other way.
>
> You are in receipt of my letter of February 8th, 1982 that outlined the situation as I believe it developed. I believe that the various surveys conducted by Q.V.I.D.A. shows [sic] that most of the flooding was due to high run offs and newly formed channels unrelated to PFRA structures. The other factor, I think, that has been well documented by the Qu'Appelle Valley Authority is the land clearing upstream that results in quicker runoff at certain times.
>
> While it is fine to criticize what was done in the past I am as concerned that the bands are not looking to the future on how best they can co-ordinate their interest with others for future protection of these lands. I agree the proposals by the Qu'Appelle Authority was [sic] not to the bands interests, from my unprofessional

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[368] Standing Buffalo Band, Band Council Resolution, November 10, 1980, DIAND file E4320-06566 (ICC Documents, p. 1208).

[369] J.D. Leask, Director General, Reserves and Trusts, Department of Indian and Northern Affairs, to D.J. Singleton, Director, Lands Directorate, Department of Indian and Northern Affairs, and E.M. Hobbs, Director, Economic and Employment Development, Department of Indian and Northern Affairs, March 12, 1982, DIAND file E4320-06566 (ICC Documents, p. 1234).

> view of planning, but unless they come forward with alternatives I believe nothing will happen unless serious flooding occurs.[370]

By February 10, 1982, the Pasqua Band, too, had issued a rescinding Band Council Resolution,[371] but W.F. Bernhardt, Head of Land Transactions for the Saskatchewan Region, advised the District Office that there was no action that could be taken in relation to the resolution at that time.[372] On March 30, 1982, however, Markuson finally replied to Pasqua Chief Lindsay Cyr:

> You know [sic] doubt are aware that the Department and Treasury Board approved the compensation as a result of your Band's [sic] B.C.R.'s of 1977 as negotiated on your behalf by your solicitor R. Wellman with P.F.R.A.
>
> It was not necessary to hold a surrender to alienate the land. When an Act of Parliament of Canada is empowered to take or *use* lands or any interest therein without the consent of the owner, the power may, with the concent [sic] of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relationship to lands in a reserve or any interest therein (Section 35 of the Indian Act). Section 9 of the Prairie Land [sic] Rehabilitation Act grants them the right and to compensate Order in Councils [sic] were obtained achieving the construction of the works. As a result your Band Funds were credited with the moneys your Band Council of the time had negotiated.
>
> We are obliged to believe that, your Band Council of the time was speaking for the people and they had agreed to the settlement negotiated on the terms. *Therefore it does not appear to be a subject that can be renegotiated as it is concluded.*[373]

At about that time, Indian Consultant Enterprises released a report entitled "Past Damages Compensation Study," which had been commissioned by QVIDA. The report included a historical overview of Indian occupancy of the Qu'Appelle Valley; transcribed interviews with valley residents; the studies of the Qu'Appelle River system and control structures, soil degradation in the valley caused by flooding, and the impact of flooding on flora and fauna; and a recommended approach to claiming compensation for these damages.[374] Over the next several months, Indian Affairs and Saskatchewan's Department of Intergovernmental Affairs reviewed the report and considered its implications.[375] Associate Deputy Minister Newton C. Steacy of the provincial department inquired whether the report was intended to be merely an information document to support a claim or the claim itself, noting that, if the latter, combining conveyance, compensation, and economic development issues in the report made it difficult to separate and deal effectively with the compensation issues. He recommended to QVIDA President Eugene Anaquod that the claim be submitted to the federal Department of Justice and the provincial Department of the Attorney General to determine whether it had any legal basis.[376]

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[370] A.H. Markuson, Director, Lands and Membership, Saskatchewan Region, Department of Indian and Northern Affairs, to Rabi Alam, Director, Planning and Review, Saskatchewan Region, Department of Indian and Northern Affairs, March 25, 1982, DIAND file E4320-06566 (ICC Documents, pp. 1237-38).

[371] Pasqua Band, Band Council Resolution, February 10, 1982, DIAND file E4320-06569 (ICC Documents, p. 1231). On receiving Pasqua's Band Council Resolution, E.J. Belfry, the District Superintendent of Reserves and Trusts, noted that the Band had received the $100,000 contemplated by the 1977 resolution "and have expended all but $7500.00 of this amount": E.J. Belfry, District Superintendent of Reserves and Trusts, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, to W.F. Bernhardt, Head, Land Transactions, Saskatchewan Region, Department of Indian and Northern Affairs, February 22, 1982, DIAND file E4320-06569 (ICC Documents, p. 1232).

[372] W.F. Bernhardt, Head, Land Transactions, Saskatchewan Region, Department of Indian and Northern Affairs, to District Manager, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, March 15, 1982, DIAND file E4320-06569 (ICC Documents, p. 1235).

[373] A.H. Markuson, Director, Lands and Membership, Saskatchewan Region, Department of Indian and Northern Affairs, to Lindsay Cyr, Chief, Pasqua Band, March 30, 1982, DIAND file E4320-06569 (ICC Documents, p. 1241). Emphasis added.

Eventually, in early 1983, Chief Lindsay Cyr, Chairman of QVIDA's Technical Sub-Committee, invited PFRA Director General Hill to attend a meeting to discuss the report. Hill declined, concurring with Steacy's observations about the report. However, he also stated:

> Further, settlements have already been effected on outstanding claims arising from PFRA's activities in the Valley. In view of this, PFRA's attendance at meetings of this nature would serve no useful purpose.[377]

On September 1, 1983, Planning and Review Director Alam forwarded the report to R.M. Connelly, Director of the Specific Claims Directorate, with a view to having QVIDA's claims considered by the Office of Native Claims. On Connelly's behalf, Senior Claims Analyst Richard Berg advised Alam that QVIDA would first have to establish a valid claim within the context of the specific claims policy, meaning that the Department of Justice would have to conduct a full factual review and provide its opinion on whether the Bands were owed an outstanding lawful obligation. Berg thought it "highly unlikely, however, that the government would agree to re-open negotiations in those cases where settlements have been reached and the provisions of the agreements fully respected."[378]

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[374] Indian Consultant Enterprises, "Past Damages Compensation Study," March 1982 (ICC Exhibit 3).

[375] A.H. Markuson, Director, Lands and Membership, Saskatchewan Region, Department of Indian and Northern Affairs, to Rabi Alam, Director, Planning and Review, Saskatchewan Region, Department of Indian and Northern Affairs, June 29, 1982, DIAND file E4320-9, vol. 1 (ICC Documents, pp. 1245-47); Newton C. Steacy, Associate Deputy Minister, Indian and Native Affairs, Department of Intergovernmental Affairs, Government of Saskatchewan, November 12, 1982, DIAND file E4320-9, vol. 1 (ICC Documents, pp. 1248-49).

[376] Newton C. Steacy, Associate Deputy Minister, Indian and Native Affairs, Department of Intergovernmental Affairs, Government of Saskatchewan, November 12, 1982, DIAND file E4320-9, vol. 1 (ICC Documents, p. 1248).

[377] Harry M. Hill, Director General, PFRA, Department of Agriculture, to Chief Lindsay Cyr, Chairman, QVIDA Technical Subcommittee, April 15, 1983, DIAND file E4320-9, vol. 1 (ICC Documents, p. 1258).

Notwithstanding Berg's pessimism, new QVIDA President Henry Delorme informed Connelly on October 21, 1983, that QVIDA intended to submit the "Past Damages Compensation Study" and a brief to update the Office of Native Claims about QVIDA's future plans.[379] However, Connelly advised Chief Delorme that the Office of Native Claims did not normally become involved in claims until the validity of a band's claim had been established, and he recommended that QVIDA deal with Indian Affairs' regional representatives.[380]

A year later, after reviewing the "Past Damages Compensation Study," Ian B. Cowie of Saskatchewan's Indian and Native Affairs Secretariat disclaimed provincial responsibility for flood damages on the reserves, advising Chief Cyr that "[t]he fact that the federal government has paid compensation to Indian Bands for flooding damages establishes a precedent which serves to indicate that any further compensation is a federal matter." However, Cowie suggested that the Bands work jointly with the provincial and federal governments towards economic development of the area and in implementing conveyancing improvements in the Qu'Appelle River valley.[381]

In October 1984, two of the Bands in the eastern Qu'Appelle Valley – Kahkewistahaw and Sakimay – issued Band Council Resolutions submitting specific claims for damage to and loss of reserve lands caused by the flooding associated with the dams at Round and Crooked Lakes.[382] The following February, Anita Gordon of the Federation of Saskatchewan Indian Nations advised PFRA Director Hill that the Federation had been asked to assist all four eastern Bands. In connection with the Federation's review of the issue,

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[378] Richard Berg, Senior Claims Analyst, Specific Claims Branch, Office of Native Claims, Department of Indian and Northern Affairs, to Rabi Alam, Director, Planning and Review, Saskatchewan Region, Department of Indian and Northern Affairs, October 3, 1983, DIAND file BW8260/SK8552-C1, vol. 1 (ICC Documents, pp. 1273-74).

[379] Chief Henry Delorme, President, QVIDA, to R.M. Connelly, Director, Specific Claims Directorate, Office of Native Claims, Department of Indian and Northern Affairs, October 21, 1983, DIAND file BW8260/SK8552-C1, vol. 1 (ICC Documents, p. 1275).

[380] R.M. Connelly, Director, Specific Claims Directorate, Office of Native Claims, Department of Indian and Northern Affairs, to Chief Henry Delorme, President, QVIDA, November 7, 1983, DIAND file BW8260/SK8552-C1, vol. 1 (ICC Documents, pp. 1276-77).

[381] Ian B. Cowie, Secretary, Indian and Native Affairs Secretariat, Government of Saskatchewan, to Chief Lindsay Cyr, QVIDA, September 4, 1984, DIAND file E4320-9, vol. 1 (ICC Documents, p. 1278).

[382] Kahkewistahaw Band, Band Council Resolution, October 12, 1984, DIAND file E4320-9, vol. 1 (ICC Documents, p. 1281); Sakimay Band, Band Council Resolution, October 17, 1984, DIAND file E4320-9, vol. 1 (ICC Documents, p. 1282).

Gordon asked Hill "on what authority PFRA in 1941 constructed the Crooked Lake Dam and the Round Lake Dam."[383]

Hill's response was interesting, both for the bases on which it claimed that the PFRA had been authorized to construct the two dams and for those bases on which it did not rely. Hill pointed to the appropriations clause in Treaty 4 as well as section 9 of the *Prairie Farm Rehabilitation Act* as the PFRA's authority to build the dams, but he made no mention of any authorization being given by the Bands or by Indian Affairs under the *Indian Act*.[384]

In the autumn of 1985, as the PFRA considered repairs to the Crooked Lake dam, PFRA Project Engineer Donald Forsythe and Senior Land Representative Frank Luchinski met with representatives of the eastern Bands to discuss the project. When Forsythe stated that he did not have the authority to discuss all aspects of the dams, QVIDA President Lindsay Cyr invited Hill to a meeting to address certain concerns before the Bands would agree to permit the PFRA to "renovate."[385] Once again, however, Hill refused to meet:

> It appears from your letter that the request for a meeting relates to concerns other than the specific matter of our request for permission to enter upon a particular reserve to conduct inspection surveys on an existing dam. In this connection, you will recall our letter to you of April 15, 1983, which clearly spelled out PFRA's position relative to the settlement of claims. In regard to the concerns referred to in your letter, may we suggest that a meeting with PFRA is not the proper forum to air and to resolve such concerns. Because of the foregoing, PFRA takes the position that it has no authority to enter into discussions or negotiations with your Association in matters that would properly form the subject matter of discussions with officials of the Department of Indian Affairs and Northern Development. Accordingly, PFRA will not attend the meeting scheduled for September 18, 1985.
>
> PFRA, for purely technical and maintenance purposes, requires a right of entry upon the Cowessess Reserve to inspect the existing structure on Crooked Lake. We wish that Chief Delorme and his Council would supply PFRA with the required permit by way of Band Council Resolution for such purposes. My officials are prepared to meet with Chief Delorme and his Council, at their convenience, to outline our requirements and to negotiate compensation if required.[386]

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[383] Anita Gordon, Research Director, Indian Rights and Treaties Research, Federation of Saskatchewan Indian Nations, to H.M. Hill, Director General, PFRA, Department of Regional Economic Expansion, February 20, 1985, PFRA file 928/7R1-11, vol. 1 (ICC Documents, p. 1283).

[384] Harry M. Hill, Director General, PFRA, Department of Regional Economic Expansion, to Anita Gordon, Research Director, Indian Rights and Treaties Research, Federation of Saskatchewan Indian Nations, April 23, 1985, PFRA file 928/7R1-11, vol. 1 (ICC Documents, pp. 1292-93).

[385] Chief Lindsay Cyr, President, QVIDA, to Harry M. Hill, Director General, PFRA, Department of Regional Economic Expansion, September 9, 1985, DIAND file E4320-9, vol. E4 (ICC Documents, p. 1298).

[386] Harry M. Hill, Director General, PFRA, Department of Regional Economic Expansion, to Chief Lindsay Cyr, President, QVIDA, September 11, 1985, DIAND file E4320-9, vol. E4 (ICC Documents, pp. 1299-1300).

Chief Cyr was disappointed with Hill's reply:

> In reviewing past recent history of Indian Band and P.F.R.A. meetings, your Department went to extra lengths to secure flooding rights on Pasqua, Muscowpetung, and Piapot (sirca [sic] 1976). It is with regret that similar action cannot be carried through to negotiate and settle present important issues and concerns of the Bands.
>
> In discussion with Chief Delorme, this action leaves the Bands little avenue except to follow through with the legal route. Eventually the issues will be resolved, however our attempts at establishing a working relationship towards resolution of our concerns will be delayed.
>
> One question here is: since you state that you "have no authority to enter in negotiations on discussions with Bands", how do you expect to gain legal permission to enter the Reserves without permission from the Bands? You are aware that two of your Dams are situated on Reserves and the process by which the Indian land access was achieved is under research at this time. The Bands will be developing a legal position with respect [to this] very soon. Their legal rights with respect to land and the process for gaining access to an[d] acquiring land under the Indian Act will have to be reviewed.
>
> Given the above facts you can understand QVIDA's interest in attempting to resolve this longstanding issue since 1940's, consequently QVIDA will continue overtures to the responsible Departments for discussions and settlement.[387]

In response to Chief Cyr's query about the way the PFRA expected to gain access without permission from the Bands, Hill stated on October 29, 1985:

> Our view on this matter is that settlements have been effected on all outstanding flood damage claims arising from PFRA's construction activities in the Qu'Appelle Valley. As a result of your continued requests to negotiate other issues and concerns with PFRA, it appears that our respective positions on these matters will not be reconciled.
>
> In addition, may I advise that our Engineering Service, upon re-evaluating all available technical data relating to the structure, have determined that the Crooked Lake Project need not be implemented at this time. Therefore, the request for right of entry dated July 10, 1985, and submitted to Chief Henry Delorme and the Cowessess Band Council is hereby withdrawn. *However, since the structure itself is not situated on Reserve land, any future rehabilitation thereof will be undertaken on land controlled by Canada (PFRA).*[388]

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[387] Chief Lindsay Cyr, President, QVIDA, to Harry M. Hill, Director General, PFRA, Department of Agriculture, September 23, 1985, DIAND file E4320-9, vol. E4 (ICC Documents, pp. 1301-02).

[388] Harry M. Hill, Director General, PFRA, Department of Agriculture, to Chief Lindsay Cyr, President, QVIDA, October 29, 1985, DIAND file E4320-9, vol. 4 (ICC Documents, p. 1303). Emphasis added.

This response stirred controversy within both QVIDA and Indian Affairs, each of which believed that at least the south end of the Crooked Lake dam sat on the Cowessess reserve.[389] Chief Cyr's response was not long in coming:

> 1. Our official position is that settlements have *not* been made with respect to any of the flood damage claims arising from P.F.R.A.'s construction activity in the Qu'Appelle Valley. We are in fact in the process of submitting a claim to the "Office of Native Claims" on land damaged and alienated as a result of the said flooding.
>   We do not want any further initiatives to be taken by your Department until this matter has been fully resolved.
>
> 2. We also take issue with your statement that [the] Crooked Lake Structure is not situated on Reserve lands. Our position is that the structure is on the Cowessess Reserve and therefore cannot be modified without the consent of the Band Council.[390]

A.J. Gross, by this time Indian Affairs' Director of Reserves and Trusts for the Saskatchewan Region, also pressed Hill for clarification.[391] Hill replied that those portions of the dam situated on the bed of the Qu'Appelle River belonged to the Province of Saskatchewan as the owner of the bed. He also provided Gross with copies of the documentation illustrating that the PFRA had paid for the damsite areas on the Cowessess and Ochapowace reserves, but that, on advice from the Department of Justice, title had never been transferred to the Minister of Agriculture.[392]

At this point, QVIDA was advised by its solicitors that its claims were facing a statutory limitations problem and that steps had to be taken immediately to submit a claim to the federal government.[393] A historical and legal statement of the claim entitled "Qu'Appelle Valley Indian Development Authority Land

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[389] Lloyd J. Sparvier, Land Management Officer, Yorkton District, Department of Indian and Northern Affairs, to A.J. Gross, Director, Reserves and Trusts, Saskatchewan Region, Department of Indian and Northern Affairs, November 16, 1985, DIAND file E4025-6-361 (ICC Documents, p. 1304).

[390] Chief Lindsay Cyr, President, QVIDA, to Harry M. Hill, Director General, PFRA, Department of Agriculture, November 21, 1985, DIAND file E4320-9, vol. E4 (ICC Documents, p. 1305).

[391] A.J. Gross, Director, Reserves and Trusts, Saskatchewan Region, Department of Indian and Northern Affairs, to Harry M. Hill, Director General, PFRA, Department of Agriculture, November 21, 1985, DIAND file E4320-9, vol. E4 (ICC Documents, p. 1307).

[392] Harry M. Hill, Director General, PFRA, Department of Agriculture, to A.J. Gross, Director, Reserves and Trusts, Saskatchewan Region, Department of Indian and Northern Affairs, December 18, 1985, DIAND file E4025-6-361 (ICC Documents, pp. 1309-10).

[393] Chief Lindsay Cyr, President, QVIDA, to David Crombie, Minister, Department of Indian and Northern Affairs, May 27, 1986, DIAND file BW8260/SR8552-C1, vol. 2 (ICC Documents, p. 1324).

Claim" was prepared on QVIDA's behalf by 116782 Canada Ltd.[394] At least seven of the Bands issued new Band Council Resolutions approving submission of the "specific claim for compensation arising from the illegal alienation and flooding" of the reserves.[395] Perhaps the most critical fact at this time, however, was that QVIDA ran into financial difficulties and was forced to seek additional funding to press its claims.[396] Indian Affairs Minister McKnight advised Chief Cyr that, although QVIDA had received considerable direct funding in the past and might receive additional funding through Indian Affairs' regional office pending acceptance of the claim for negotiation, it should seek other sources of funding, such as the Bands themselves or other agencies already receiving government funding.[397]

By October 1, 1986, QVIDA had supplied the historical documents supporting its claim to Indian Affairs, and Berg directed the preparation of a document summary prior to forwarding the claim to the Department of Justice for legal review.[398] A year later, the process of reviewing the claim was well under way, but the results were not favourable to the Bands. With regard to three western Bands that had participated in the 1977 settlement, Acting Senior Claims Analyst Barbara Wilgress noted with regard to the work done by the PFRA's Caligiuri:

> A. Mr. Caligiuri of PFRA outlined the following criteria used by PFRA in calculating *in 1977* compensation paid the 3 bands at that time:

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[394] 116782 Canada Ltd., "Qu'Appelle Valley Indian Development Authority Land Claim," April 14, 1986 (ICC Exhibit 5).

[395] Pasqua Band, Band Council Resolution, May 1, 1986, DIAND file E4320-9, vol. 6 (ICC Documents, p. 1318); Ochapowace Band, Band Council Resolution, undated [circa May 1, 1986], DIAND file E4320-9, vol. 6 (ICC Documents, p. 1319); Kahkewistahaw Band, Band Council Resolution, May 6, 1986, DIAND file E4320-9, vol. 6 (ICC Documents, p. 1320); Cowessess Band, Band Council Resolution, May 8, 1986, DIAND file E4320-9, vol. 6 (ICC Documents, p. 1321); Muscowpetung Band, Band Council Resolution, May 22, 1986, DIAND file E4320-9, vol. 6 (ICC Documents, p. 1322); Piapot Band, Band Council Resolution, May 27, 1986, DIAND file E4320-9, vol. 6 (ICC Documents, p. 1323); Sakimay Band, Band Council Resolution, June 12, 1986, DIAND file E4025-6-364 (ICC Documents, p. 1325).

[396] A.J. Gross, Director, Reserves and Trusts, Saskatchewan Region, Department of Indian and Northern Affairs, to Chief Lindsay Cyr, President, QVIDA, March 26, 1986, DIAND file E4320-9, vol. 6 (ICC Documents, p. 1317); Chief Lindsay Cyr, President, QVIDA, to David Crombie, Minister, Department of Indian and Northern Affairs, May 27, 1986, DIAND file BW8260/SR8552-C1, vol. 2 (ICC Documents, p. 1324); Rodney Soonias, Barrister & Solicitor, to Bill McKnight, Minister, Department of Indian and Northern Affairs, July 11, 1986, DIAND file BW8260/SR8552-C1, vol. 2 (ICC Documents, p. 1326); Minutes of QVIDA meeting, August 21, 1986, DIAND file BW8260/SR8552-C1, vol. 2 (ICC Documents, pp. 1327-29); Chief Lindsay Cyr, President, QVIDA, to Rem Westland, Director, Specific Claims Branch, Department of Indian and Northern Affairs, January 18, 1988 (ICC Documents, pp. 1340-44).

[397] Bill McKnight, Minister, Department of Indian and Northern Affairs, to Chief Lindsay Cyr, President, QVIDA, October 16, 1986, DIAND file E-4320-9, vol. 6 (ICC Documents, pp. 1334-36).

[398] Richard Berg, Senior Claims Analyst, Specific Claims Branch, Office of Native Claims, Department of Indian and Northern Affairs, to Chief Lindsay Cyr, President, QVIDA, October 1, 1986 (ICC Documents, pp. 1332-33).

1. Revenues foregone (i.e. that could have pertained if the land had not been flooded);
2. Revenues due "forever" (i.e. as if the land were leased "forever")
3. Delay in making payment

B. He indicated that the land valuations in 1941 were done by a PFRA engineer, and the $ value per acre of compensation paid by PFRA to non-Indians established by him. The engineer's valuation had been the basis, or first step, in the 1977 calculation of what had to be paid to the Indians. It came to about $17,000. *The three bands had, therefore, received a monumentally generous amount in settlement.*[399]

Three weeks later, Wilgress informed Chief Cyr that "[t]he record of events respecting the compensations previously paid is such that Mr. Westland greatly doubts that the QVIDA claim is strong enough to merit a presentation to the Department of Justice."[400]

Finally, in November 1992, after three years of inactivity on the claim, Carol Cosco of Specific Claims West advised Chief Cyr that QVIDA's file was being closed, subject to being reopened when QVIDA was ready to resubmit its claim.[401] There is no evidence of any further progress on the claim until QVIDA decided to commence the present inquiry before the Commission in September 1994.[402]

We now turn to the legal issues arising in this inquiry by virtue of the foregoing historical background.

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[399] Note to file, Barbara Wilgress, Acting Senior Claims Analyst/Assistant Negotiator, Specific Claims Branch, Department of Indian and Northern Affairs, December 22, 1987, DIAND file BW8260/SK8552-C1, vol. 2 (ICC Documents, p. 1337). It should be noted that the reference to the land valuations in 1941 "done by a PFRA engineer" obviously relates to Fetterly, who was clearly *not* with the PFRA.

[400] Barbara Wilgress, Acting Senior Claims Analyst/Assistant Negotiator, Specific Claims Branch, Department of Indian and Northern Affairs, to Chief Lindsay Cyr, President, QVIDA, January 18, 1988, DIAND file BW8260/SK8552-C1, vol. 2 (ICC Documents, p. 1337).

[401] Carol J. Cosco, Claims Analyst, Specific Claims West, Department of Indian and Northern Affairs, to Chief Lindsay Cyr, President, QVIDA, November 5, 1992, DIAND file BW8260/SK8552-C1, vol. 2 (ICC Documents, p. 1349).

[402] Matthew Bellegarde, Claims and Policy Development Officer, Federation of Saskatchewan Indian Nations, to Kim Fullerton, Commission Counsel, Indian Claims Commission, October 11, 1994, enclosing Qu'Appelle Valley Indian Development Authority Record of Decision, September 12, 1994, with respect to a request by Chief Mel Isnana, Standing Buffalo, Chief Todd Peigan, Pasqua, Chief Eugene Anaquod, Muscowpetung, and Chief Joe Fourhorns, Piapot, to have the Indian Claims Commission carry out an inquiry into Canada's rejection of the QVIDA claim; Angela Delorme, Executive Secretary, Yorkton Tribal Council, to Kim Fullerton, Commission Counsel, Indian Claims Commission, October 26, 1994, enclosing Qu'Appelle Valley Indian Development Authority Record of Decision, September 12, 1994, with respect to a request by Chief Louis Taypotat, Kahkewistahaw, Chief Denton George, Ochapowace, Chief Terry Lavallee, Cowessess, and Chief Lindsay Kaye, Sakimay, to have the Indian Claims Commission carry out an inquiry into Canada's rejection of the QVIDA claim.

PART III

ISSUES

The broad question before the Indian Claims Commission in this inquiry is whether the claims of the participating QVIDA First Nations disclose a breach of the Crown's "lawful obligations" to the First Nations under the Specific Claims Policy. In answering this question, the Commission must determine whether, based on the evidence and submissions, these claims were properly rejected by Canada.

Canada and the participating QVIDA First Nations have agreed that, to assess the claims properly, the Commission must consider the following five issues:

1 Could the Crown authorize the PFRA under section 34 of the *Indian Act*, 1927, to use and occupy reserve lands for flooding purposes? If so, was the PFRA so authorized? If not, did Canada breach its fiduciary obligations to the QVIDA First Nations by failing to obtain proper authorization under the Act?

2 If Canada could and did properly authorize the PFRA under section 34 of the *Indian Act*, 1927, to use and occupy reserve lands for flooding purposes, did the Crown nevertheless have a fiduciary obligation to consult or otherwise consider the best interests of the QVIDA First Nations before proceeding?

3 Did the terms of Treaty 4 preclude the Crown from relying on section 34 of the *Indian Act*, 1927, or otherwise require the consent of the QVIDA First Nations to authorize the PFRA to use and occupy reserve lands for flooding purposes?

4 Did the Band Council Resolutions signed by the Pasqua, Standing Buffalo, and Muscowpetung First Nations in the 1970s effectively release the Crown

and the PFRA from all past, present, and future claims for damage caused by the Echo Lake control structure built in the 1940s?

5 Did those QVIDA First Nations with reserves adjacent to or on both sides of the Qu'Appelle River and lakes have common law riparian water rights, including rights to the river beds? If so, did the Crown have an obligation to ensure that these water rights were protected under the *North-West Irrigation Act*, 1894, and the *Dominion Power Act*, and to act in the First Nations' best interests when those rights might be affected? Moreover, did the Crown act in the best interests of the QVIDA First Nations when it authorized the PFRA to construct control structures that altered the First Nations' riparian interests and caused consequential losses?

The Commission will now consider each of these issues in turn.

PART IV

ANALYSIS

ISSUE 1 SECTION 34 OF THE *INDIAN ACT*, 1927

Could the Crown authorize the PFRA under section 34 of the *Indian Act*, 1927, to use and occupy reserve lands for flooding purposes? If so, was the PFRA so authorized? If not, did Canada breach its fiduciary obligations to the QVIDA First Nations by failing to obtain proper authorization under the Act?

The fundamental premises of Canada's position in relation to this issue are twofold: first, that under section 34 of the 1927 *Indian Act*, it was open to the Superintendent General of Indian Affairs or his delegate to authorize the PFRA to erect control structures on the Qu'Appelle River and thereby flood Indian lands; and, second, that the Superintendent General of Indian Affairs or his delegate actually issued such authorization to the PFRA. QVIDA takes the opposite view on each issue.

Before considering section 34, it is important to point out that, in 1941, alternative means by which Canada might have acquired fee simple or lesser interests in reserve lands for flooding purposes were provided by sections 48 and 51 of the 1927 *Indian Act*. Section 48 comprised the expropriation provision, stating:

> **48.** No portion of any reserve shall be taken for the purpose of any railway, road, public work, or work designed for any public utility *without the consent of the Governor in Council*, but any company or municipal or local authority having statutory power, either Dominion or provincial, for taking or using lands or any interest in lands without the consent of the owner may, *with the consent of the Governor in Council as aforesaid*, and subject to the terms and conditions imposed by such consent, exercise such statutory power with respect to any reserve or portion of a reserve.[403]

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[403] *Indian Act*, RSC 1927, c. 98, s. 48. Emphasis added.

The requirements for surrenders were set forth in section 51:

> **51.** Except as in this Part otherwise provided, no release or surrender of a reserve, or a portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, ***unless the release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years***, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of any officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General.
>
> 2. No Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near, and is interested in the reserve in question.
>
> 3. The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some of the chiefs or principal men present thereat and entitled to vote, before any person having authority to take affidavits and having jurisdiction within the place where the oath is administered.
>
> 4. When such assent has been so certified, as aforesaid, ***such release or surrender shall be submitted to the Governor in Council for acceptance or refusal.***[404]

It will be seen from the highlighted portions of these sections that an expropriation requires the consent of the Governor in Council, and a surrender requires the consents of both the Governor in Council and the band. Canada acknowledged at an early stage in the planning conferences preceding the inquiry that the facts in this case demonstrate that neither expropriation nor surrender took place with respect to any of the reserves in question.[405] It is therefore necessary for the Commission to consider whether section 34 formed a valid means by which the PFRA could be authorized to flood Indian lands and, if so, whether authorization under section 34 was in fact given.

Interpretation of Section 34

Section 34 of the *Indian Act*, 1927, states:

> **34.** No person, or Indian other than an Indian of the band, shall ***without the authority of the Superintendent General***, reside or hunt upon, occupy or use any

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[404] *Indian Act*, RSC 1927, c. 98, s. 51. Emphasis added.

[405] Indian Claims Commission, "Summary, Indian Claims Commission [4th] Planning Conference, Qu'Appelle Valley Indian Development Authority," April 3, 1996, p. 5.

> land or marsh or reside upon or occupy any road, or allowance for road, running through any reserve or belonging to or occupied by such band.
>
> 2. All deeds, leases, contracts, agreements or instruments of whatsoever kind made, entered into, or consented to by any Indian, purporting to permit persons or Indians other than Indians of the band to reside or hunt upon such reserve, or to occupy or use any portion thereof, shall be void.[406]

In their submissions, the parties have addressed the following issues that arise out of their differing interpretations of section 34:

- Is the PFRA a "person" under section 34?
- Does section 34 permit the occupation or use of reserve lands for flooding purposes?

In light of the Commission's findings in relation to the latter issue, we do not find it necessary to deal with the question of whether the PFRA is a "person" under section 34.

As to whether section 34 permits the occupation or use of reserve lands for flooding purposes, this simple statement of the issue belies the complexity of its substance. The first question that the issue raises is whether section 34 is intended to be a ***permitting*** or ***enabling*** provision at all, or whether it is merely intended to ***prohibit*** trespass. Assuming that section 34 ***is*** an enabling provision, the second question is whether the occupation or use of reserve lands for flooding purposes represents a disposition of reserve lands that is beyond the ambit of section 34 in any event.

Permission or Prohibition

The QVIDA First Nations submit that the fundamental purpose of section 34 was to prohibit trespasses by non-members of a band on Indian reserves belonging to that band. The means by which a non-member could avoid being in trespass while on a reserve was to be there under the authority of the Superintendent General, since section 34 contemplates that no person is to reside, hunt upon, occupy, or use reserve land "***without*** the authority of the Superintendent General." However, since the section is framed in the negative, the positive right to be on the reserve, according to the First Nations, must be found in other sections of the Act. As counsel stated:

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[406] *Indian Act*, RSC 1927, c. 98, s. 34. Emphasis added.

> Section 34 ***prohibits*** a trespass, it doesn't ***permit*** a trespass. In order to avoid a trespass a person under the *Indian Act*, the 1927 *Indian Act*, had to obtain authority to be on a reserve, and that is pursuant to other provisions of the *Indian Act*. In other words, you don't look to section 34 for permission to trespass on the reserve, you look to other authorities under the Act which permitted them to be on the land.
>
> Section 34 provides that unless you have authority from the Superintendent General no person other than an Indian or of a band can reside on the reserve or use and occupy the reserve. Persons receiving this type of authority from the Superintendent General would have to do it under other provisions of the Act, not under section 34.[407]

Canada asserts that section 34 was an *enabling* provision that provided a separate source of authorization for non-members of a band to be on that band's reserve.

In the final analysis, however, we do not believe that it is necessary for the Commission to decide in the context of this inquiry whether section 34 comprises an independent enabling provision. As will be seen, counsel for Canada argues that section 34 is the legislative forerunner of the present subsection 28(2) and should be interpreted consistently with the jurisprudence that has considered the meaning and scope of the later provision. Without deciding the issue, we are prepared to assume for the moment that section 34, like subsection 28(2), is an enabling provision for the purpose of considering whether Canada properly authorized the PFRA to use and occupy reserve lands in the Qu'Appelle Valley for flooding purposes.

Nature of the Disposition to the PFRA

The QVIDA First Nations submit that, even if section 34 of the 1927 *Indian Act* conferred an independent basis for Canada to authorize encroachment on Indian reserves, Parliament did not intend to permit "permanent" flooding to be authorized under that provision:

> [I]t is submitted that the flooding of the reserve lands is not the type of occupation and use of reserve lands contemplated under section 34. The permanent flooding and alienation of reserve lands cannot be taken in *ejusdem generis* with the particular words under section 34. The types of uses of land contemplated under section 34 ("reside or hunt upon", "occupy or use land or marsh" or "roads"), are of a transitory or at least a non-permanent nature. In contrast, the flooding of certain reserve lands appears to be permanent. The flooded reserves cannot be used by the First Nations. They have been as effectively removed from their reserve land base as if they

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[407] ICC Transcript, June 26, 1997, p. 68 (David Knoll). Emphasis added.

> had been alienated to a private third party through the surrender or expropriation provisions. Therefore, the claimants submit that section 34 does not contemplate the permanent alienation of land and that if such permanent alienation were to be legally permitted it would have to be made in accordance with the surrender or expropriation provisions of the 1927 *Act*, not under section 34.[408]

For its part, Canada contended that the flooding of reserve lands in this case did not constitute a permanent alienation requiring an expropriation or surrender. In taking this position, Canada relied on the reasons of the Supreme Court of Canada in *Opetchesaht Indian Band v. Canada*,[409] a decision issued on May 22, 1997, shortly after the First Nations in the present case had submitted their written argument.

In *Opetchesaht*, the Crown in 1959, with the consent of the Band Council, granted the British Columbia Hydro and Power Authority (Hydro) a right of way for an electric power transmission line across the Band's reserve to convey electricity to consumers off the reserve. The agreement provided for the right of way to comprise an area 150 feet wide over 7.87 acres of the reserve (approximately 2.5 per cent of the reserve land base) "for such a period of time as the said right of way is required for the purpose of" the transmission line. The total consideration paid to the Band was a single payment of $125 per acre for the land included in the right of way. There was no evidence that the Band was paid less than fair market value.

The right of way was granted by means of a permit issued under subsection 28(2) of the *Indian Act*, which states:

> **28.**(2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

The permit gave Hydro "the rights to construct, operate and maintain an electric power transmission line" and the exclusive right to occupy the portions of the surface of the reserve where poles were erected and that part of the air space where the wires were strung. The Band retained the right to use and occupy the balance of the right-of-way area, subject to specified restrictions. It should be noted that the right of way was granted only after "protracted" bargaining among Hydro, the Crown, and the Band, "with a variety of proposals from each side, including yearly rental payments for a term of 20 years, free electricity for members of the Band, various offers on a per acre value, as well as expropriation under s. 35 of the *Indian Act*."[410]

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[408] Submission on Behalf of the QVIDA First Nations, May 5, 1997, p. 46.

[409] *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file No. 24161).

In the late 1980s, the Band chose to develop its reserve, with the proposed improvements to include a private road, a reservoir access road, and a drainage ditch located within Hydro's right of way. Hydro offered to consent to the construction, provided, among other things, that the Band would agree to take responsibility for any lost generation of power to third parties, submit to Hydro's safety and construction concerns, and not interfere with Hydro's use of the right of way.[411]

In 1992, the Band applied to the Supreme Court of British Columbia for a declaration that the permit was void and unenforceable, claiming that section 28(2) did not authorize the grant of a right of way for electric power transmission lines over the reserve for an indefinite period of time. The relief sought also included an order for possession of the right of way lands and an award of damages for trespass. Lander J allowed the application, but the Court of Appeal set aside the judgment, concluding that subsection 28(2) allowed grants of interests for periods having no predetermined termination date.

The Supreme Court of Canada dismissed the appeal, but split 7-2 on the question of whether the permit in that case was properly issued under subsection 28(2). On behalf of the majority, Major J determined that there were three issues to be determined:

> First, it is necessary to identify the nature and scope of the rights granted by the permit; second, whether the termination of the permit is defined by the happening of a reasonably ascertainable event; and finally, whether the permit constitutes a "sale, alienation, lease, or other disposition" under s. 37 of the *Indian Act* rather than a grant of rights under s. 28(2).[412]

He then made the following findings:

- The permit comprised a statutory right of way or easement, and Hydro's rights in the land were not exclusive. As Major J noted:

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[410] *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file No. 24161), p. 3, Major J.
[411] *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file no. 24161), p. 6, Major J.
[412] *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file no. 24161), p. 8, Major J.

> The respondent Hydro can only use the land for the power transmission line and related maintenance purposes and the appellant Band retains the right to use the right-of-way. The Band's ability to use the land is restricted only in that they cannot erect buildings on it or interfere with the respondent Hydro's easement. *Both Hydro and the Band share use of the right-of-way.*[413]

- The right of way was granted for an indeterminate period. Although it was unknown exactly *when* Hydro's rights would terminate, it was clear that the right of way *would* terminate when it was no longer required for a transmission line. That point in time would not be at the sole discretion of Hydro, but rather would be at that "justiciable" moment when the line was objectively no longer required.[414]
- The phrase "any longer period" in subsection 28(2) can be measured either by dates or events. Its end date "need not be defined in terms of a specific calendar date as long as it is ascertainable," in which case the grant will not be considered to be in perpetuity. Major J included this caution, however:

> There could be a grant where the terminable event is so remote and uncertain that the period is, in fact, perpetual. That would be a matter of fact in the particular case.[415]

- As to whether a surrender under section 37 was the more appropriate means of disposing of the interest in land, Major J stated that "surrenders are required *as a general rule* not only when the Indian band is releasing all its interest in the reserve forever, but whenever any interest is given up for any duration of time."[416] Section 37 states:

> 37. Except where this Act otherwise provides, lands in a reserve shall not be sold, alienated, leased or otherwise disposed of until they have been surrendered to Her Majesty by the band for whose use and benefit in common the reserve was set apart.[417]

However, Major J concluded that the voluntary disposition of an interest in Indian reserves is not limited to surrender:

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[413] *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file no. 24161), p. 10, Major J. Emphasis added.

[414] *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file no. 24161), pp. 11-12, Major J.

[415] *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file no. 24161), p. 14, Major J.

[416] *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file no. 24161), p. 16, Major J. Emphasis added.

[417] *Indian Act*, RSC 1952, c. 149, s. 37.

> Also apparent on the face of s. 37 from the qualification at the beginning of s. 37 is the legislative intention that it operate ***in conjunction with and subject to*** other provisions of the *Indian Act*. There is in this qualification an express recognition that other provisions of the *Indian Act* also deal with sales, alienations, leases or other dispositions of lands in a reserve. . . .
>
> The practice of the Minister demonstrates that in his view, some sections of the *Indian Act* could be used interchangeably depending on the circumstances. The Agreed Statement of Facts dated May 16, 1996, illustrates that the practice which occurred in Canada after the 1956 amendments to the *Indian Act* was to grant power line rights of way across reserve lands both by way of surrender and conveyance (s. 37), expropriation (s. 35) and by permit (s. 28(2)). . . .
>
> The question is whether the permit was properly granted under s. 28(2). Perhaps the easement in the permit could have been granted under s. 37, but that section must be read subject to other provisions in the *Indian Act*. ***The proper question is to decide the circumstances in which s. 28(2) could not apply, the default provision being the general rule in s. 37 against alienation without a surrender.***
>
> In my view, s. 28(2) cannot apply any time a portion of the Indian interest in any portion of reserve land is permanently disposed of. . . .
>
> In the instant case, the respondent Hydro was accorded limited rights of occupation and use ***for an indeterminate but determinable and ascertainable period of time. There was no permanent disposition of any Indian interest. Furthermore, the Band and Hydro were obligated to share the rights of use and occupation of the land***, with the limited exceptions of the area of ground giving support to the poles and the air space occupied by the poles. Consequently, the surrender requirement of s. 37 does not apply to the present permit and more importantly, no rights exceeding those authorized by s. 28(2) were granted. The indeterminate easement granted on the face of this permit is a disposition of a limited interest in land that does not last forever.
>
> Surely it was intended that the band council could at least have the right to grant that type of easement. Surrender involves a serious abdication of the Indian interest in land and gives rise to both a broad discretion and an equally onerous fiduciary obligation on the Crown to deal with the Indian lands thus surrendered. The case law establishes that in the case of an unconditional and absolute surrender the Indian interest in land actually ***disappears***. . . .[418]

Major J further considered whether the permit granted under section 28(2) should be struck down on policy grounds:

> The remaining question is whether the grant of rights for an indeterminate period conflicts with the policy of prohibiting use of reserve land by third parties absent approval of the Minister and the band. This leads to a consideration of the policy

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[418] *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file no. 24161), pp. 17-20, Major J. Emphasis added.

behind the rule of general inalienability. Both the common law and the *Indian Act* guard against the erosion of the native land base through conveyances by individual band members or by any group of members. Government approval, either by way of the Governor in Council (surrender) or that of the Minister, is required to guard against exploitation: ***Blueberry River Indian Band, supra***, at p. 370, ***per*** McLachlin J.

On the other hand, the *Indian Act* also seeks to allow bands a degree of autonomy in managing band resources for commercial advantage in the general interest of the band. Collective consent of the Indians, either in the form of a vote by the band membership (surrender) or by a resolution of the band council, is required to ensure that those affected by the transfer assent to it. *The extent to which individual band members participate in the approval process depends on the extent to which the proposed disposition affects individual or communal interests.* In the case of sales, dispositions and long-term leases or alienations permanently disposing of any Indian interest in reserve land, surrender is required, involving the vote of all members of the band. On the other hand in the case of rights of use, occupation or residence for a period of longer than one year, only band council approval is required.

It is important that the band's interest be protected but on the other hand the autonomy of the band in decision making affecting its land and resources must be promoted and respected. These sometimes conflicting values were identified by McLachlin J. in ***Blueberry River Indian Band, supra***, at p. 370:

> My view is that the *Indian Act*'s provisions for surrender of band reserves strikes [sic] a balance between the two extremes of autonomy and protection.

Gonthier J. at p. 358, speaking for the majority, accepted this principle:

> As McLachlin J. observes, the law treats aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured.

With the twin policies of autonomy and protection in mind, s. 37 and s. 28(2) reflect that, depending on the nature of the rights granted, different levels of autonomy and protection are accorded. Section 37 demonstrates a high degree of protection, in that the approval of the Governor in Council and the vote of all of the members of the band are required. *This indicates that s. 37 applies where significant rights, usually permanent and/or [illegible]tal rights in reserve lands are being transferred*. On the other hand, under s. 28(2), lesser dispositions are contemplated and the interest transferred must be temporary. It is evident from a review of this permit that it does not violate the balance between autonomy and protection struck by the *Indian Act*. This is not a case where surrender, with all of its administrative and legal impositions was required in terms of the overall policy of the *Indian Act*. . . .

This appeal deals with the narrow issue of whether the permit was an indeterminate or perpetual grant of rights in reserve land and whether the provisions of s. 28(2) to grant indeterminate and limited rights violated the overall scheme of the

> *Indian Act*. I have concluded that the grant of limited indeterminate rights in reserve land is permissible under s. 28(2) as a question of law.[419]

In summary, Hydro's right to use the land was not exclusive, and the term of the permit was for a period that, rather than being permanent, was "indeterminate but determinable and ascertainable." Moreover, Major J concluded that a sufficient balance between autonomy and protection would be achieved in the circumstances of the *Opetchesaht* case by leaving the decision-making power in relation to the permit in the hands of the Band Council. Since no permanent disposition was being made and the rights granted were not entirely exclusive, subsection 28(2) *could* apply to grant the interest by means of a permit. This meant that, although it would have been possible to dispose of the interest by invoking the "default" surrender provisions of section 37, it was not necessary to do so. However, Major J acknowledged that, depending on the facts of a given case, a permit's terminating event could be so remote and uncertain that the period would, in fact, be perpetual. Significantly, he concluded that "s. 37 applies where significant rights, usually permanent and/or total rights in reserve lands are being transferred."

On behalf of the minority, McLachlin J agreed that the term of the permit in *Opetchesaht* was not "perpetual" in the sense of being "totally within Hydro's control" or "a span of time which we may predict with certainty will never end."[420] However, she still viewed the term as sufficiently lengthy, and the alienated interest sufficiently important, that the surrender provisions should have been triggered:

> At the same time, however, it must be acknowledged that the easement has the *potential* to continue forever (or at least until the world ends and its continuance becomes academic). In terms relevant to the concerns of the Opetchesaht people, it shows every promise of binding not only the current generation which never agreed to it, but many generations to come. The permit may without exaggeration be characterized as an alienation of reserve lands for an indefinite period, a period which has the potential to extend to future generations of the Opetchesaht people for as far forward as we can see. Is this, we must ask, the type of disposition Parliament intended to allow under the summary procedures of s. 28(2) of the *Indian Act* upon agreement between the Minister and the current band council? Or is it the sort of alienation of interest in land which Parliament sought to safeguard by the surrender and transfer provisions of s. 37 of the Act?

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[419] *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file no. 24161), pp. 21-22, Major J. Emphasis added.

[420] *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file no. 24161), p. 6, McLachlin J.

> The fact that the band can still use the land in many ways cannot be determinative. The fact is, the band cannot use it in ways it deems important to the welfare of the current generation. It cannot build houses on the land and it cannot put roads or a reservoir on the land. And the problem transcends the needs of this generation. Doubtless future generations of band members will have their own needs and their own proposals for the use of the land. If the respondents are right, the future generations will be precluded from doing so by a decision made by a temporary band council and a minister decades, not inconceivably centuries, before.[421]

McLachlin J considered the phrase "or any longer period" in subsection 28(2) of the *Indian Act* to be ambiguous because it has no single plain meaning. Based on principles of construction of statutes relating to Indians as set forth in cases like *Nowegijick v. The Queen*[422] and *Mitchell v. Peguis Indian Band*,[423] she reasoned that statutory provisions aimed at maintaining Indian rights should be broadly interpreted, whereas provisions aimed at limiting or abrogating such rights should be narrowly construed.[424] Having regard for the balance to be sought in the *Indian Act*'s surrender provisions between the two extremes of autonomy and protection, McLachlin J concluded:

> Section 28 was never intended to deal with major long-term alienations of Indian interests in their reserve lands. It was aimed rather at the short-term, non-exclusive occupant -- the itinerant worker, service provider or agricultural lessee. The phrase "any longer period", consistent with this interpretation, is best understood as a period defined in relatively short terms of months and years. This makes sense in textual terms as well. The phrase "any longer period" relates to the earlier phrase "a period not exceeding one year". This suggests that what Parliament intended by "any longer period" was also a term capable of being expressed in finite calendar terms.
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> The question arises: how long is the short or temporary use contemplated by s. 28(2)? For the purposes of this case, it is unnecessary to decide this issue; certainly an alienation which has the potential to go on as long as anyone can foresee falls outside the scope of s. 28(2). However, for purposes of guidance in other cases, I would suggest that commitments longer than the two-year mandate of band councils should not be transacted through s. 28(2).
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> This interpretation is consistent with the policy of the *Royal Proclamation of 1763*, and the principle that the long-term alienation of interests in Indian lands may be effected only through surrender to the Crown and consent of the band member-

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[421] *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file no. 24161), pp. 6-7, McLachlin J.

[422] *Nowegijick v. The Queen*, [1983] 1 SCR 29.

[423] *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85.

[424] *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file no. 24161), pp. 8-10, McLachlin J.

> ship as a whole. To accept the views of the respondents in this case is to accept that parties seeking to obtain long-term or indefinite interests in reserve lands short of outright ownership could use the s. 28 permit provisions to circumvent the surrender requirements of the *Indian Act* and proceed to dispose of long-term interests in land with only the consent of the band council. It would be to attribute to Parliament the intention to establish two alternative and inconsistent ways for alienation of major interests in reserve lands -- one strictly limited and regulated under s. 37, the other requiring only the approval of the Minister and the band council. Finally, it would attribute to Parliament the intention to accord the entire band membership the right to decide on alienation under s. 37, while depriving the membership of that power for transfers that may represent equally serious alienations under s. 28(2), and this despite the fact that s. 37 establishes consent of the band members as a condition of alienation not only of outright transfers of land, but of "leases" or other "dispositions". I cannot accept that these were Parliament's intentions.[425]

From the interplay of the majority and minority decisions in *Opetchesaht* – and particularly in light of Justice Major's comment that "s. 37 applies where significant rights, usually permanent and/or total rights in reserve lands are being transferred" – the Commission discerns that the rights conveyed by a specific instrument or transaction must be measured with reference to two sliding scales: one *temporal*, relating to the length of the term and the ascertainability of its termination, and the other *substantive*, relating to the content of the interest granted.

As the ruling in *Opetchesaht* demonstrates, an interest in land or a right to use land can be granted under subsection 28(2) for a considerable period of time if the nature and extent of the interest is not substantial. This statement is, however, subject to the overriding qualification that the full procedural protections of the *Indian Act*'s surrender provisions will apply if the terminating event of the authorization given is so remote and uncertain that the period would, in fact, be perpetual. On the other hand, it can readily be seen that the surrender provisions of the Act might be called for where a substantial interest in land is conveyed, although for a very short period of time. For example, a lease purporting to give a tenant exclusive use of an entire reserve for a period of one year or less, and requiring all resident members of the band to vacate the reserve during the term, might be considered sufficiently onerous that it should be put to a vote of all eligible band members and not just the Band Council. The clear cases would be short-term, minor interests in reserve lands, for which provisions like section 28 of the 1952 *Indian Act*

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[425] *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file no. 24161), pp. 15-17, McLachlin J.

(as amended in 1956) or section 34 of the 1927 statute (still assuming that it is similar in substance to section 28) would suffice, and long-term or permanent dispositions of significant interests, for which surrenders would have to be obtained. The more difficult cases are those like *Opetchesaht* and the present one, in which it becomes necessary to draw the lines to demarcate acceptable dispositions under sections 28 or 34 from those that are not acceptable.

Where the majority and the minority in *Opetchesaht* differed was in where to draw those lines. Major J characterized the interest in that case as a non-exclusive statutory easement within which "Hydro can only use the land for the power transmission line and related maintenance purposes" and "[t]he Band's ability to use the land is restricted only in that they cannot erect buildings on it or interfere with the respondent Hydro's easement."[426] Conversely, McLachlin J focused not on the retained ability of the Band to use the right of way, but instead on the limits that the right of way placed on the Band's freedom to develop the land in a manner of its own choosing for the foreseeable future. Similarly, whereas Major J highlighted the "ascertainable" and "justiciable" termination of the right of way (when it would no longer be required for power transmission purposes) to show that the interest conveyed was not permanent, McLachlin J emphasized that the term was temporary only "in the sense of a span of time which we may predict with certainty will never end."[427]

The Commission has recently had the opportunity to carefully review the *Opetchesaht* case in our inquiry into the flooding claim of the Eel River Bar First Nation.[428] In the Eel River case, the Town of Dalhousie built a dam in 1963 on the Eel River reserve and flooded reserve lands without any specific authority to do so and without compensating the Band until 1970. At that time, following lengthy negotiations with the Band Council, an agreement was reached to transfer administration and control of reserve lands required for a headpond to the New Brunswick Water Authority (NBWA) and to grant an easement to additional lands for a pumping station, pipeline right of way, and access road to maintain the Eel River water supply system. The Band received $15,000 ($130 per acre) for the required land, $25,000 for damages caused by the erection and operation of the dam and water supply system, and a one-time payment of $9,591.12 plus annual payments from $10,000 to $27,375 for 20 years based on the quantity of water pumped from the system. In the Eel River Bar inquiry, the First Nation also asserted that valid authority to use and occupy reserve lands could be accomplished only by means of a surrender, and not by using the *Indian Act*'s expropriation and subsection 28(2) permit provisions. The Commission, however, concluded that the use and occupation of reserve land for the pipeline, access road, and pumping station were properly authorized by a permit granted under section 28(2) for a right of way because the nature and extent of the interest granted was not substantial and the permit was for an ascertainable period.

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[426] *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file no. 24161), p. 10, Major J.

[427] *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file no. 24161), p. 6, McLachlin J.

[428] Indian Claims Commission, *Eel River Bar First Nation Inquiry: Report on Eel River Dam Claim* (Ottawa, December 1997).

The Commission has had close regard for the following similarities – and significant differences – between the facts in this inquiry and those in *Opetchesaht* and the Eel River Bar inquiry:

- In *Opetchesaht*, the Supreme Court of Canada considered a permit under subsection 28(2) of the 1952 *Indian Act*, whereas in this case we are asked to address the more nebulous rights conferred by section 34 of the 1927 statute. Subsection 28(2) dealt with permits for periods of up to one year, "or any longer period," while section 34 made reference to neither permits nor periods. Moreover, subsection 28(2) contemplates band council consent to the use or occupation of a reserve, whereas section 34 requires the consent of neither a band nor a band council.
- *Opetchesaht* dealt with a linear power line, and the Band retained the right to use the surface of the land, subject to being unable to interfere with or use the land in which Hydro's power poles were anchored or the airspace in which its transmission lines were strung. In this sense, the Supreme Court of Canada concluded that Hydro's use of the land was exclusive, but not substantial. Similarly, in the Eel River Bar inquiry, the Commission found that the NBWA's rights to the access road were not exclusive, and that the rights to use 2.43 acres of reserve land for the pumping station and pipeline right of way were not substantial even though they were essentially exclusive. Based on the limited evidence presented to the Commission in that inquiry, the facts did not disclose that the pumping station and pipeline right of way substantially interfered with the Eel River Bar First Nation's use of its reserve land. Conversely, the nature and extent of the interest granted in the present case was substantial because the QVIDA Bands relinquished a much larger area, although they retained the right to use the surface of those areas not subject to continuous flooding. In this

respect, although the Bands in all three cases were entirely precluded from using certain areas of their reserves, the pivotal difference lies in the *scale* of the Bands' exclusion.

- In ***Opetchesaht*** and the Eel River Bar inquiry, the Band Councils were involved in the negotiations for the rights of way and consented to the grants. Conversely, the evidence indicates that the QVIDA Bands and their councils were not party to either the negotiations undertaken or the consent given to the PFRA in the 1940s to flood reserve lands.
- Major J concluded in ***Opetchesaht*** that the right of way interest acquired in that case was temporary even though the circumstances of its termination were unforeseen and speculative:

> The permit provides that the respondent Hydro is entitled to use the reserve lands in question for as long as it requires a transmission pole line to pass through the portion of the reserve over which it is currently constructed. It is not difficult to imagine a number of circumstances in which this requirement would expire. ***While all are speculative***, there is the possibility that the generating station at Sproat Falls might be abandoned, that demographic changes in the area might affect the location, size and requirement of the transmission poles. More remote is the possibility of electricity being replaced by another energy source. It is obvious that technology has affected the way we live in ways that were earlier unimaginable. The example of the Canadian experience with the railways is apposite. Even 50 years ago, this country's railroads appeared to be a permanent fact of Canadian travel and transportation. Today, we have seen many railway lines abandoned in favour of airlines and highways.[429]

In the Eel River Bar inquiry, the Commission concluded that the grant of the right of way to the NBWA was for an indeterminate but readily ascertainable period of time, and therefore we considered that case to fall squarely within the reasons of the Supreme Court of Canada in ***Opetchesaht***. In the present case, it will be difficult to forecast the termination of use of reserve lands for the control structures on the Qu'Appelle River as long as irrigation is required to make lands serviced by the dams arable. Moreover, the dams also serve as flood control structures and regulate the water levels in the Qu'Appelle Valley for the benefit of residential and recreational uses that have developed along the shorelines. The dams have thus become multi-use structures, and we have no hesitation in concluding that, although the initial pri-

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[429] ***Opetchesaht Indian Band v. Canada*** (1997), unreported, May 22, 1997 (SCC file no. 24161), p. 11, Major J.

> mary use of the dams – and perhaps the only recognized permissible use under the PFRA's governing legislation – was irrigation, it was clearly foreseen at the time of their construction that they would serve other needs. By way of contrast, we can see no alternative uses for the transmission lines in *Opetchesaht* other than as transmission lines. For this reason, although Major J was prepared to concede that the termination of use of the transmission lines in that case was speculative and unforeseen, we find the termination of use of the control structures in this case to be even more speculative, remote, and unlikely, if such is possible.

Canada takes the position that the general statements by Major J with regard to the interplay between the various provisions of the *Indian Act* illuminate the applicability of section 34 to this case, since they demonstrate that the surrender provisions are not the only way to convey a relatively long-lasting right over reserve lands. The test set out by Major J, according to counsel, is "to decide the circumstances in which s. 28(2) [in this case, section 34] could not apply, the default provision being the general rule in s. 37 [section 50 of the 1927 *Indian Act*] against alienation without a surrender."[430]

Can section 34 apply in this case? We do not think so. In deciding this question, we believe it is necessary to look at the terms of the authorization granted to the PFRA to use and occupy reserve lands for flooding purposes. We agree with Canada's submission that, assuming section 34 and subsection 28(2) are parallel provisions, any authorization granted pursuant to section 34 would have to be subject to at least the same limitations as a permit issued under subsection 28(2). That is, to the extent that the terminating event of the authorization is so remote and uncertain that the period would, in fact, be perpetual, the authorization would not be permitted under section 34 and the surrender provisions would apply by way of default. Likewise, where the nature and extent of the interest granted is sufficiently substantial, section 34 cannot apply.

By Canada's own admission, the authorization in this case, assuming that it was granted, was given *implicitly* rather than *explicitly*, and we cannot point to any specific period for which it was granted. Therefore, we can only conclude that, assuming authorization was given, the term of that authorization, by necessary implication, and having regard for the PFRA's mandate, must have been for such period as the dams would be required for irrigation purposes. If we look only to this use and not to other uses for the dams that have since arisen, we cannot conclude that the use in this case is any more permanent than the uses in *Opetchesaht* or the Eel River Bar inquiry. If we are permitted to consider flood control, as well as residential and recreational purposes, we would then consider the use in this case to be more permanent.

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[430] Submission on Behalf of the Government of Canada, June 6, 1997, p. 38.

The more telling features of this case, however, are the *exclusivity* and *extent* of the PFRA's use of the continuously flooded areas. The transmission lines in *Opetchesaht* were linear but, in the view of the minority, they nevertheless had a significant effect on the Band's ability to use the right of way and its remaining land.

In the present case, by way of contrast, we are faced with large areas of land that, except in periods of extended drought, are more or less continuously flooded, and are thereby rendered completely useless to the QVIDA First Nations. The PFRA must be considered to have exclusive use of these areas. Other large areas are subject to flooding only at certain times of year, or are less frequently inundated. There is some evidence before the Commission to suggest that some of these lands may actually benefit from being occasionally flooded, while other areas may be sufficiently saturated to be unfit for haying or other purposes. The exclusivity of the PFRA's use will depend on the capacity of these lands to be used for other purposes notwithstanding being under water from time to time. The point is that, unlike the *Opetchesaht* and Eel River cases, in this case there are large areas of land involved, and much of the land is *completely unavailable* to the First Nations *all of the time*. Moreover, in this case the flooded lands were of considerable economic, cultural, and social value to the Bands, as the evidence of the elders demonstrated. In our view, these are the features that distinguish the QVIDA First Nations from the Opetchesaht Band and the Eel River Bar First Nation, and that lead us to the conclusion that, in this case, section 34 was not an appropriate vehicle for authorizing the use and occupation of reserve lands for flooding purposes.

Moreover, the fact that section 34 contemplates the consent of neither a band nor a band council justifies, in our view, a more restrictive interpretation being placed on section 34 than on subsection 28(2). The fact that the Band Council *consented* to the disposition of the right of way in *Opetchesaht* played a significant role in shaping the decision of the majority in that case.

As the Supreme Court of Canada concluded in ***Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)***,[431] the underlying scheme and purpose of the *Indian Act* is to maintain intact for bands of Indians the reserves set apart for them. Therefore, in cases involving surrenders, the consent of both the band and the Crown is required, for the following reasons set forth by McLachlin J:

> My view is that the *Indian Act*'s provisions for surrender of band reserves strikes a balance between the two extremes of autonomy and protection. The band's consent was required to surrender its reserve. Without that consent the reserve could not be sold. But the Crown, through the Governor in Council, was also required to consent to the surrender. The purpose of the requirement of Crown consent was not to substitute the Crown's decision for that of the band, but to prevent exploitation.
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> As Dickson J. characterized it in *Guerin* [*v. The Queen*[432]] (at p. 383):
>
> > The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited.
>
> It follows that under the *Indian Act*, the Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band's decision was foolish or improvident – a decision that constituted exploitation – the Crown could refuse to consent. In short, the Crown's obligation was limited to preventing exploitative bargains.[433]

Gonthier J wrote in similar terms:

> As McLachlin J. observes, the law treats aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured.[434]

In *Opetchesaht*, Major J extended these principles to dispositions by way of permit under subsection 28(2):

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[431] *Blueberry River Indian Band and Doig River Indian Band v. Canada (Minister of Indian Affairs and Northern Development) et al.*, [1988] 1 CNLR 73, 14 FTR 161 (TD); appeal and cross-appeal dismissed in *Apsassin v. Canada*, [1993] 3 FC 28, 100 DLR (4th) 504, 151 NR 241, [1993] 2 CNLR 20 (FCA); appeal and cross-appeal allowed in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25, 130 DLR (4th) 193 (SCC). This case is subsequently referred to in the text of this report as *Apsassin*.

[432] *Guerin v. The Queen*, [1985] 1 CNLR 120 (SCC).

[433] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25, 130 DLR (4th) 193 (SCC) at 370-71 (SCR), McLachlin J.

[434] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25, 130 DLR (4th) 193 (SCC) at 358 (SCR), Gonthier J.

> This leads to a consideration of the policy behind the rule of general inalienability. Both the common law and the *Indian Act* guard against the erosion of the native land base through conveyances by individual band members or by any group of members. Government approval, either by way of the Governor in Council (surrender) or that of the Minister, is required to guard against exploitation. . . .
>
> On the other hand, the *Indian Act* also seeks to allow bands a degree of autonomy in managing band resources for commercial advantage in the general interest of the band. Collective consent of the Indians, either in the form of a vote by the band membership (surrender) or by a resolution of the band council, is required to ensure that those affected by the transfer assent to it. The extent to which individual band members participate in the approval process depends on the extent to which the proposed disposition affects individual or communal interests. In the case of sales, dispositions and long-term leases or alienations permanently disposing of any Indian interest in reserve land, surrender is required, involving the vote of all members of the band. On the other hand in the case of rights of use, occupation or residence for a period of longer than one year, only band council approval is required.
>
> *It is important that the band's interest be protected but on the other hand the autonomy of the band in decision making affecting its land and resources must be promoted and respected.*[435]

If the underlying purpose and scheme of the *Indian Act* is to guard against the erosion of the Indian land base, and if the autonomy of Indians with respect to the disposition of reserve lands is to be honoured and respected in the manner suggested in *Apsassin* and *Opetchesaht*, can section 34(1) be used by the Crown unilaterally to grant an interest in land as intrusive and long term as flooding without any autonomous Indian approval of such a grant by an Indian band or its members? We think not. Given the dual policies of autonomy and protection identified in *Apsassin* and *Opetchesaht*, we can only conclude that any rights that could have been authorized by the Superintendent General under section 34 must have been even more limited than the interests available for disposition under subsection 28(2). To repeat the words of Major J, "[t]he extent to which individual band members participate in the approval process depends on the extent to which the proposed disposition affects individual or communal interests." It follows that, if neither band members nor band council participate in the approval process, the extent to which the proposed disposition can affect individual or communal interests should be very limited indeed. To find otherwise would permit ready circumvention of the surrender and expropriation processes of the

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[435] *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file no. 24161), pp. 21-22, Major J. Emphasis added.

Indian Act, and would seriously compromise the autonomy of a band in dealing with its reserve lands.

That being said, we might be prepared to conclude that an authority or permit issued pursuant to section 34 of the 1927 *Indian Act* or subsection 28(2) of later Acts would be sufficient to authorize occasional and perhaps even beneficial flooding of those areas of the reserves that remain available to the First Nations for haying or other purposes. Such a conclusion would not solve Canada's problem in this case, since the large areas of land that are *continuously* flooded – the areas that are obviously most critical to the ongoing operation of the structures – would still not fall within the scope of the subsection. However, it might reduce the quantum of compensation payable if it can be demonstrated that certain lands have benefited, or at least not been adversely affected, and have thus remained available for productive use. As we have not been asked to comment on quantification issues in this inquiry, we will not comment further on this subject at this time.

Actual Authorization

In the written and oral submissions before the Commission, counsel for the parties addressed the issues of (a) whether the Deputy Minister of Mines and Resources, the Director of the Indian Affairs Branch, and the Acting Director of the Branch were appropriate statutory delegates of the Superintendent General of Indian Affairs in relation to his power to authorize the use and occupation of reserve lands for flooding purposes; and (b) whether such authorization was *actually*, if only *impliedly*, given to the PFRA by one of those statutory delegates. However, having concluded that it was not open to Canada to rely on section 34 to authorize the use and occupation of reserve lands for flooding purposes, the Commission is not required to answer these questions.

It should be noted that Canada, by its own admission, concedes that no authorization, express or implied, was ever given to flood land on the Standing Buffalo reserve. The evidence clearly shows that no one contemplated that any portion of the Standing Buffalo reserve would be affected by the project. For this reason, we cannot conclude that Indian Affairs acquiesced in the use and occupation of these lands, and accordingly we find that, even if authority to encroach could have been granted under section 34, no such authority was given. In short, Canada trespassed on the flooded portions of the Standing Buffalo reserve from the early 1940s until at least 1977 – and perhaps longer, depending on our analysis below in relation to the 1977 Band Council Resolutions.

With regard to the remaining five Bands that are party to this inquiry, while Indian Affairs *may* have authorized the PFRA to use and occupy reserve lands for flooding purposes – and we make no finding on this point – such authorization could not be validly given under section 34 of the 1927 *Indian Act*. The result is that, in addition to trespassing on Standing Buffalo's land by virtue of Canada's failure to authorize flooding on that reserve, the PFRA was likewise in trespass on the reserve lands of the Muscowpetung and Pasqua First Nations from the early 1940s to at least 1977, and remains in trespass to this day on the reserve lands of the Cowessess, Ochapowace, and Sakimay First Nations. We will address the question of Canada's continuing presence after 1977 on reserve lands of the three western First Nations later in this report.

ISSUE 2 CANADA'S FIDUCIARY OBLIGATIONS

If Canada could and did properly authorize the PFRA under section 34 of the *Indian Act*, 1927, to use and occupy reserve lands for flooding purposes, did the Crown nevertheless have a fiduciary obligation to consult or otherwise consider the best interests of the QVIDA First Nations before proceeding?

In framing their case relating to the alleged breaches by Canada of its fiduciary duties in relation to the disposition of the lands flooded by the Qu'Appelle Valley dams, the QVIDA First Nations rely in large measure on the decisions of the Supreme Court of Canada in *Guerin v. The Queen*[436] and *Apsassin*, the findings of the Ontario Court of Appeal in *Chippewas of Kettle and Stony Point v. Canada*,[437] and the recent reports of this Commission regarding the surrender claims of the Kahkewistahaw and Moosomin First Nations.[438] They analogize Canada's duties arising on surrenders of reserve lands to the context of authorized use and occupancy under section 34 of the 1927 *Indian Act*.

In its reports on the Kahkewistahaw and Moosomin inquiries, the Commission analysed pre-surrender breaches of fiduciary obligations in three contexts: where a band's understanding of the surrender is inadequate or the

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[436] *Guerin v. The Queen*, [1985] 1 CNLR 120 (SCC).

[437] *Chippewas of Kettle and Stony Point v. Canada* (1996), 31 OR (3d) 97 (Ont. CA).

[438] ICC, *Kahkewistahaw First Nation Report on 1907 Reserve Land Surrender Inquiry* (Ottawa, February 1997); ICC, *Moosomin First Nation Report on 1909 Reserve Land Surrender Inquiry* (Ottawa, March 1997).

Crown's conduct has tainted the dealings in a manner that makes it unsafe to rely on the band's understanding and intention; where a band has ceded or abnegated its decision-making power to or in favour of the Crown; and where a band's decision to surrender reserve land is foolish or improvident and thus exploitative. With regard to the first of these contexts, the QVIDA First Nations submit:

> The historical evidence in the QVIDA Specific Claim clearly demonstrates that the Crown was in a conflict of interest by purporting to represent the best interests of the First Nations, on one hand, and by assisting PFRA in the construction of the dams on the other hand. The claimants submit that the Crown has failed to establish that the authorization under section 34 was not intended to benefit any one other than PFRA and the Crown itself. The Department in fact has acknowledged that these dams would adversely affect the reserves which would suffer "substantial damage". Accordingly, Canada breached its fiduciary obligation by allowing PFRA to construct the dams which were clearly not in the best interests of the First Nations.[439]

Under section 34 of the 1927 *Indian Act*, there could be no cession or abnegation of decision-making power by the QVIDA Bands because the Superintendent General was clothed with the power to authorize encroachments on reserve lands. Nevertheless, the First Nations argue that, having this discretion, the Superintendent General had a fiduciary obligation to exercise it in their best interests:

> [S]ection 34, at a minimum, imposes upon the Crown, particularly in a situation where it has total discretion to decide on how reserve lands should be "used or occupied", an obligation on its part to act in the First Nations' best interests, and . . . equity will hold a fiduciary to a "strict standard of conduct" and ensure that the power is exercised with "loyalty and care". The claimants submit that Canada has breached its fiduciary duty by having failed to act in the First Nations' best interests by not only failing to have informed them of the dams' construction and its implications but also having proceeded with the section 34 authorization knowing full well that the First Nations' best interests would be adversely affected.[440]

Finally, with regard to whether the authorizations granted to the PFRA in this case amounted to exploitation, the First Nations argue:

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[439] Submission on Behalf of the QVIDA First Nations, May 5, 1997, p. 51.
[440] Submission on Behalf of the QVIDA First Nations, May 5, 1997, pp. 50-51.

> [W]here under the *Act*, the Band has no control, as opposed to a "measure of control" over the alienation of their interests in land, then if there is evidence of exploitation, the *Act* imposes a fiduciary obligation on the Crown to prevent the alienation of their interests in the reserve.
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> The claimants submit that the flooding of their lands resulted in the permanent disposition of those lands, as well as the destruction of the habitat upon which many of them relied upon [sic] for their livelihood, all without consultation with or approval by the First Nations. This constituted exploitation such that Canada breached its fiduciary obligation by allowing PFRA to flood these lands knowing that adverse consequences would result.[441]

For its part, Canada submits that "there was no obligation to consider solely the interests of the First Nations affected in cases such as this, involving an expropriation or a non-consensual authority granted to use reserve lands for public purposes . . . [but rather] it is the function of the Crown to balance the various interests at stake."[442] In drawing this conclusion, counsel for Canada relied on the decision of the Federal Court of Appeal in *Kruger v. The Queen*, in which Urie J adopted the following reasons of Mahoney J at trial:

> Parliament cannot have intended that the Governor in Council consider only the best interest of the Band concerned in deciding whether or not to consent to an expropriation of reserve lands. It is rarely in the best interest of an occupant to be dispossessed or of an owner to be deprived of his property against his will. Certainly, here, it was not in the best interest of the Band.
>
> The defendant's duty to the Band, as trustee, was by no means the only duty to be taken into account. Evidence is clear that those officials responsible for the administration of the Indian Act urged a lease while those responsible for the airport ultimately urged expropriation. The Governor in Council was entitled to decide on the latter. There was no breach in trust in doing so.[443]

Once it had been determined that the Qu'Appelle Valley dams would flood and cause damage to reserve lands, Canada acknowledges that it owed a fiduciary obligation to the First Nations affected to ensure that they were adequately compensated for any damages caused to them. The existence of a fiduciary obligation where there is an involuntary disposition of land finds support in the reasons of Heald J in *Kruger*:

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[441] Submission on Behalf of the QVIDA First Nations, May 5, 1997, p. 52.

[442] Submissions on Behalf of the Government of Canada, June 6, 1997, p. 49.

[443] *Kruger v. The Queen*, [1985] 3 CNLR 15 at 42 (FCA), Urie J.

> Accordingly, I think it clear that the fiduciary obligation and duty being discussed in *Guerin* would also apply to a case such as this as well and that on the facts in this case, such a fiduciary obligation and duty was a continuing one – that is, it arose as a consequence of the proposal to take Indian lands and continued throughout the negotiations leading to the expropriations and thereafter including the dealings between the Crown and the Indians with respect to the payment of the compensation to the Indians in respect of Parcels A and B.[444]

As to the content of the fiduciary obligation, Canada relies on the highlighted portion of the following excerpt from the decision of Urie J in *Kruger*:

> When the Crown expropriated reserve lands, being Parcels A and B, there would appear to have been created the same kind of fiduciary obligation, vis-à-vis the Indians, as would have been created if their lands had been surrendered. ***The precise obligation in this case was to ensure that the Indians were properly compensated for the loss of their lands as part of the obligation to deal with the land for the benefit of the Indians***, just as in the *Guerin* case, the obligation was to ensure that the terms of the lease were those agreed to by the Indians as part of the general obligation to them to ensure that the surrendered lands be dealt with for their use and benefit. How they ensured that lies within the Crown's discretion as a fiduciary and so long as the discretion is exercised honestly, prudently and for the benefit of the Indians there can be no breach of duty.[445]

Canada argues that it fulfilled its fiduciary obligation to the QVIDA First Nations by paying compensation to the eastern First Nations in 1943, and by agreeing with the western First Nations in 1977 to settle past, present, and future damages caused by the Echo Lake control structure.

Although we have considered the parties' arguments, we believe that it is unnecessary to address this issue in the circumstances of the present inquiry. Had we found that Canada could and did properly authorize the PFRA under section 34 of the 1927 *Indian Act* to use and occupy reserve lands for flooding purposes, we would then need to determine whether, before proceeding, the Crown nevertheless had a fiduciary obligation to consult or otherwise consider the best interests of the QVIDA First Nations. However, we have concluded that Canada should have proceeded by way of surrender or expropriation rather than under section 34. Since it did not do so, Canada failed to comply with the *Indian Act*, and any authority granted would thus have been invalid. Accordingly, there is little to be gained by determining whether

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[444] *Kruger v. The Queen*, [1985] 3 CNLR 15 at 61(FCA), Heald J.

[445] *Kruger v. The Queen*, [1985] 3 CNLR 15 at 41 (FCA), Urie J.

Canada was also in breach of its fiduciary obligations. We therefore decline to do so.

ISSUE 3 CANADA'S OBLIGATIONS UNDER TREATY 4

Did the terms of Treaty 4 preclude the Crown from relying on section 34 of the *Indian Act*, 1927, or otherwise require the consent of the QVIDA First Nations to authorize the PFRA to use and occupy reserve lands for flooding purposes?

The QVIDA First Nations argue that Treaty 4 provides an independent means for finding that, before Canada can sell, lease, or otherwise dispose of reserve lands, it must obtain the consent of the affected band. Specifically, the First Nations rely on the following treaty provision:

> And Her Majesty the Queen hereby agrees, through the said Commissioners, to assign reserves for said Indians, such reserves to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, after conference with each band of the Indians, and to be of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families; provided, however, that it be understood that, if at the time of the selection of any reserves, as aforesaid, there are any settlers within the bounds of the lands reserved for any band, Her Majesty retains the right to deal with such settlers as She shall deem just, so as not to diminish the extent of land allotted to the Indians; and provided, further, that *the aforesaid reserves of land, or any part thereof, or any interest or right therein, or appurtenant thereto, may be sold, leased or otherwise disposed of by the said Government for the use and benefit of the said Indians, with the consent of the Indians entitled thereto first had and obtained*, but in no wise shall the said Indians, or any of them, be entitled to sell or otherwise alienate any of the lands allotted to them as reserves.[446]

According to the First Nations, this provision means that "[t]he federal government assumes a fiduciary role in the context of its legal power to dispose of reserve lands, a power which can only be exercised with the consent of the First Nations and for their use and benefit."[447] First Nations thus have the corresponding "right to be consulted by Canada before Canada makes any disposition of reserve lands; they have the right to grant or withhold their consent to such a disposition; and they have the right to have the reserve land remain intact, in the absence of granting their consent to a disposition."[448]

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[446] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer and Controller of Stationery, 1966), p. 6. Emphasis added.

[447] Submissions on Behalf of the QVIDA First Nations, May 5, 1997, p. 54.

As to what would happen should Treaty 4 and the *Indian Act* differ in their requirements for dispositions of reserve lands, the First Nations submit that the important distinction is in the test employed to reconcile those differences:

> Prior to the passage of section 35 of the *Constitution Act* in 1982, the courts generally considered that federal legislation was paramount and could supersede the terms of the treaties with the First Nations. However, the extent to which the *Indian Act* would have prevailed over Treaty No. 4 depends upon the tests used: overlap, inconsistency or conflict. If the *Indian Act* prevailed wherever it overlapped with provisions of Treaty No. 4 then the *Indian Act* surrender provisions would effectively replace Treaty No. 4 obligations, which required consent to reserve dispositions. On the other hand, if a more restrictive test is adopted, then the *Indian Act* would have less [sic]limits on the rights and obligations under Treaty No. 4.[449]

The First Nations then relied on the decision of Cory J in *R. v. Badger*[450] as authority for the proposition that a restrictive test should be employed, such that federal legislation should be held to prevail over a treaty right only in cases of direct conflict and not where there is mere inconsistency or overlap. Accordingly, the foregoing treaty rights should, in QVIDA's submission, remain intact, since the provisions of Treaty 4 "were not superseded by any legislation."[451]

Canada disagrees with the First Nations' analysis, contending that the terms of the *Indian Act* prevail to the extent that they are inconsistent with Treaty 4. However, Canada also approaches the issue from a different perspective, relying on the following provision of Treaty 4:

> It is further agreed between Her Majesty and Her said Indian subjects that such sections of the reserves above indicated as may at any time be required for public works or building of whatsoever nature may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made to the Indians for the value of any improvements thereon, and an equivalent in land or money for the area of the reserve so appropriated.[452]

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[448] Submissions on Behalf of the QVIDA First Nations, May 5, 1997, p. 56.

[449] Submissions on Behalf of the QVIDA First Nations, May 5, 1997, p. 56.

[450] *R. v. Badger*, [1996] 4 WWR 457.

[451] ICC Transcript, June 26, 1997, pp. 81-82 (David Knoll).

[452] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer and Controller of Stationery, 1966), p. 7.

In Canada's submission, the word "appropriated" in this provision relates to both expropriations and "lesser" dispositions such as a permit under section 28 of later versions of the *Indian Act* and presumably authority granted under section 34 of the 1927 statute. It can also apply to dispositions of the full fee simple interest or to lesser interests such as easements or rights of way. In short, this provision, according to Canada, allows it to rely on section 34 to grant authority to use and occupy reserve lands without the consent of the band affected. As for the First Nations' interpretation of the treaty, Canada argued:

> It is also notable that such an interpretation would also mean that lesser, non-consensual (or at least not expressly consensual) interests, such as a permit granted by the Minister for less than one year under section 28(2), would also arguably constitute a violation of treaty. Indeed, even a permit for more than one year issued with the consent of the Band Council could be attacked as not expressing the consent of the band (i.e. merely the consent of the band council). It is submitted that this is not a reasonable interpretation of the treaty provision.[453]

The First Nations respond that the appropriation provision of Treaty 4 is limited to the expropriation context, and that Canada has already acknowledged that there was neither an expropriation nor a surrender in this case.

For the same reasons that we gave in relation to QVIDA's claim regarding Canada's fiduciary obligations, we believe that it is unnecessary to address this issue in the circumstances of the present inquiry. The nature and term of the disposition to the PFRA were such that Canada should have obtained the consents of the Bands and the Governor in Council under the surrender provisions of the *Indian Act*, or it should have at least obtained the consent of the Governor in Council to expropriate the required interest. Its failure to do so means that Canada failed to comply with the *Indian Act* and that any authority granted would thus have been invalid. As before, there is little to be gained by determining whether Canada was also in breach of its treaty obligations. We again decline to do so.

ISSUE 4 EFFECTS OF THE 1977 BAND COUNCIL RESOLUTIONS

Did the Band Council Resolutions signed by the Pasqua, Standing Buffalo, and Muscowpetung First Nations in the 1970s effectively release the Crown and the PFRA from all past, present, and future claims for damage caused by the Echo Lake control structure built in the 1940s?

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[453] Submissions on Behalf of the Government of Canada, June 6, 1997, pp. 52-53.

It will be recalled that, in 1977, as a result of the discovery that Muscowpetung, Pasqua, and Standing Buffalo had never been compensated for the flooding of their reserve lands, these Bands entered into a settlement agreement with the PFRA. Under the terms of that agreement, evidenced by separate Band Council Resolutions executed by the respective Bands, the Bands were paid the sum of $265,000.00 and the PFRA was released, in relation to Pasqua and Standing Buffalo, "from all past, present and future claims in respect to erection of the said [Echo Lake] control structure and consequential flooding." For Muscowpetung, the release related to "lands now flooded by the said control structure." The three western Bands further agreed "to authorize the issuance of a permit to [the] PFRA in respect of the continued operation of the said control structure."[454] Although the Bands received and spent most, if not all, of the settlement funds, no permit for the continued operation of the control structures and flooding of reserve lands was ever issued, owing to concerns raised by the Bands regarding the perpetual nature of the settlement and the area of land to be flooded. The Bands subsequently purported to rescind the Band Council Resolutions and any authority conveyed in them to flood reserve lands.

These facts give rise to three key issues that the Commission must consider:

- Were the Band Council Resolutions invalid because they effected permanent dispositions of interests in reserves?
- Did the Band Council Resolutions release Canada and the PFRA from liability?
- Could the Bands rescind the 1977 Band Council Resolutions?

We will now consider each of these issues in turn.

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[454] Band Council Resolution, Pasqua Band, February 8, 1977, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 1069); Band Council Resolution, Standing Buffalo Band, February 8, 1977, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 1070); Band Council Resolution, Muscowpetung Band, February 15, 1977, PFRA file 928/7E4, vol. 5 (ICC Documents, p. 1074).

Were the Band Council Resolutions Invalid?

Permit vs Expropriation or Surrender

The Commission has already reviewed at length the recent decision of the Supreme Court of Canada in *Opetchesaht* in the context of our consideration of whether the Superintendent General of Indian Affairs could grant authority to use and occupy reserve lands for flooding purposes under section 34 of the 1927 *Indian Act*. Even if it can be assumed that section 34 is similar in nature to subsection 28(2) of the 1952 *Indian Act*, as amended, we concluded that, although the majority of the Court found that the disposition in *Opetchesaht* fell within the scope of subsection 28(2), the present case is distinguishable on its facts because of the more substantial nature of the interest granted to the PFRA and the possibly more remote likelihood of its termination.

That being the case, we must also conclude that it was not open to Canada, even with the consent of the respective Band Councils, to authorize the PFRA to occupy or use reserve land for flooding purposes under subsection 28(2) of the 1970 *Indian Act* in force at the time the settlements were reached. For ease of reference, we will restate subsection 28(2):

> **28.**(2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.[455]

In its written argument, Canada suggests that, by disposing of a mere right of way under subsection 28(2) rather than allowing the PFRA to expropriate the full fee simple interest in the flooded lands, Indian Affairs was acting in an appropriate manner "to affect the Indians' interest as little as possible."[456] In making this statement, Canada referred to the Commission's decision in its inquiry into the railway right of way claim of the Sumas Band, in which the Commission held:

> Was there a breach of fiduciary duty in the failure to exercise this discretion to grant less than the full fee simple? The Crown had an obligation to consider the public interest in a railway, as well as the interests of the Sumas Band. An expropriation of land will not be in the best interests of a Band; therefore, a "best interests" standard

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[455] *Indian Act*, RSC 1970, c. I-6, s. 28.

[456] Submission on Behalf of the Government of Canada, June 6, 1997, p. 52.

> is not applicable. In our view, the obligation on the Crown in this context is to do as little injury as possible to the Indians' interests. The public interest could have been satisfied by a grant of a right of way as long as the land was needed by the railway. Any grant beyond that did not further the public purpose, and was nothing more than a gratuitous disposition of Indian lands in favor of the railway company. We thus find that, if the letters patent were effective to transfer absolute title to VV & E, the Crown failed in its fiduciary duty by granting the right-of-way lands without a railway-purposes limitation.[457]

The Federal Court of Appeal recently reached a similar conclusion in *Semiahmoo Indian Band v. Canada*, in which Isaac CJ agreed with the finding of the Trial Judge that there had been a breach of Canada's fiduciary duty to the Band. Certain reserve lands had been surrendered by the Band in 1951, although the evidence demonstrated that the Band would not have surrendered its land without the threat of expropriation. The lands were apparently required to expand Canada's customs facilities at the Douglas Border Crossing, but they remained unused after surrender and eventually became the subject of a consultant's study, commissioned at the request of the federal Department of Public Works, to develop portions of the land for commercial purposes. The record further showed that, over the years, the Band had made a number of requests to have the land returned to it when no apparent steps were being taken to use the land for public purposes; these requests had been refused on the basis that studies were underway to determine how to use the property, or that use of the land for expanding the customs facilities was imminent. No public use of the land had been made for some 40 years when, following the Band's receipt of the consultant's report proposing that the land be used for a resort, the Band commenced the action for breach of fiduciary duty. On the question of Canada's fiduciary obligations to the Band in such circumstances, Isaac CJ stated:

> It is in the context of these findings that the Trial Judge defined the respondent's pre-surrender fiduciary duty, and then concluded that this duty was breached in the 1951 surrender. The Trial Judge described the nature and scope of the respondent's duty as follows:
>
> > When land is taken in this way and it is not known what, if any, use will be made of it, or whether the land is going to be used for government purposes, I think there is an obligation on the fiduciary to condition the taking by a reversionary provision, or ensure by some other mechanism that the least possible impairment

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[457] ICC, *Report on Inquiry into Sumas Band Indian Reserve No. 6 Railway Right of Way Claim* (Ottawa, February 1995), (1996) 4 ICCP 3 at 40.

> of the plaintiffs' rights occurs. I am persuaded there was a breach of the fiduciary duty owed to the plaintiffs.
>
> Did the respondent breach its pre-surrender fiduciary duty?
>
> Having regard to the circumstances of this case, I am in respectful agreement with the Trial Judge's characterization of the respondent's pre-surrender fiduciary duty. I also agree with the Trial Judge's conclusion, based on the facts, that the respondent breached this duty when it consented to the 1951 surrender. In my view, the 1951 surrender agreement, assessed in the context of the specific relationship between the parties, was an exploitative bargain. There was no attempt made in drafting its terms to minimize the impairment of the Band's rights, and therefore, the respondent should have exercised its discretion to withhold its consent to the surrender or to ensure that the surrender was qualified or conditional.[458]

We agree that Canada should seek to minimize its impairment of a band's rights with regard to its reserve lands. In this context, it may have been entirely appropriate for Canada to acquire an interest in the nature of a right of way or easement rather than the full fee simple in the lands continuously or occasionally flooded as a result of the control structures erected in the Qu'Appelle Valley. By obtaining this lesser interest, Canada allowed the QVIDA Bands to retain a reversionary interest in the land as well as the right to use those portions of the lands that may not be flooded from time to time.

However, as we discussed previously in relation to section 34 of the 1927 *Indian Act*, it is the interplay of the *nature* and *duration* of the interest being conveyed that determines whether the appropriate mechanism for disposing of the interest is expropriation or surrender, on the one hand, or a mere permit under subsection 28(2), on the other. Furthermore, Canada is not obliged to acquire the entire fee simple interest when it proceeds by way of expropriation or surrender; it can instead expropriate or obtain a surrender of a lesser interest, such as a right of way or easement. However, if the interest being obtained, while less than the full fee simple, is still sufficiently important in nature and lengthy in duration, then even that lesser interest should be obtained by means other than subsection 28(2). In *Opetchesaht*, Major J used the example of a mineral lease as one situation in which a lesser interest than the fee simple should be acquired using a surrender:

> In my view, s. 28(2) cannot apply any time a portion of the Indian interest in any portion of reserve land is permanently disposed of. For example, before permission to extract minerals in a reserve is granted by the Minister, surrender is required. I

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[458] *Semiahmoo Indian Band v. Canada*, [1997] FCJ No. 842 (unreported, June 24, 1997), para. 40-41.

> would note that this would be true whether the right to exploit and extract minerals were granted forever or for limited duration under a lease. For example, the mineral rights could well be disposed of under a document entitled a "lease". One must always look to the true nature of the rights granted. Even if the right to extract were granted only temporarily under the lease, in fact such a grant would forever deprive the band of a resource which formed part of the reserve. Surrender of mineral rights has been required under successive *Indian Acts* before disposition thereof to third parties.[459]

From this example, it can be seen that, although the duration of the mineral lease may be "ascertainable," the nature of the interest being disposed of is sufficiently "permanent" or important as to lie beyond the scope of subsection 28(2). A surrender or expropriation is therefore required.

In the result, we must reiterate our conclusion that, even with the consent of the Muscowpetung, Pasqua, and Standing Buffalo Band Councils, Canada could not rely, on the facts of this case, on subsection 28(2) as the basis for authorizing the PFRA to occupy or use reserve lands for flooding purposes.

Effects of Subsection 28(1)

Even if the Commission is wrong in the foregoing conclusion regarding the meaning and scope of subsection 28(2), we would nevertheless conclude that the 1977 Band Council Resolutions were ineffective to grant such authority. This is because subsection 28(1) of the 1970 *Indian Act* provided:

> **28.**(1) Subject to subsection (2), a deed, lease, contract, instrument, document or agreement of any kind whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.

The only permitted exceptions to subsection (1) exist under subsection (2), where an appropriate authorizing permit may be issued by the Minister for a use or occupation or other exercise of rights on a reserve for a period not exceeding one year, or by the Minister, with the consent of the band council, for any longer period.

A plain reading of subsection 28(2) suggests that, to allow occupation or use of reserve lands for a period of longer than one year, band council consent must be obtained *and* the Minister must permit the occupation or use in writing. Without satisfying both requirements, an agreement for use and occupation appears to be void. But does the case law interpreting section 28(2) support this interpretation?

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[459] *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file no. 24161), pp. 19-20, Major J.

The philosophy underlying subsection 28(2) has a long history that predates the subsection itself and finds its roots in the *Royal Proclamation of 1763*. The jurisprudence supports the conclusion that a written permit from the Minister was a required element for an effective authorization to occupy or use reserve lands under subsection 28(2).[460]

The policy rationale behind the provision can be seen in the decision of the Exchequer Court of Canada in *R. v. McMaster*.[461] In that case, a property known as Thompson's Island, which formed part of St Regis Indian Reserve, was leased in 1817 by the Chiefs of the occupying Band to David Thompson for a period of 99 years. The lease contained a renewal clause that would have permitted it to be extended to a full term of 999 years. In 1872, McMaster sought to acquire the lease from Thompson's successor, McDonald, and, concerned that the validity of title might be open to challenge, McMaster inquired if the Department of Indian Affairs would recognize the title to the lease if he could show that it had been properly assigned to him and if he would pay rental arrears that had been accumulating since 1862. After protracted negotiations, the parties in 1882 agreed that the Department would recognize McMaster as assignee on payment of the past due rentals, but that he could not obtain a new title in his own name because the property, never having been surrendered by the Band to the Crown, could not be sold or leased. In 1883, McMaster paid the arrears, and the following year the Department of Justice provided its opinion that McMaster had sufficiently proven his title to be considered the holder of the lease originally granted to Thompson, and that his possessory title as against anyone but the Crown was admitted.

In 1915, McMaster applied to the Department of Indian Affairs to renew the lease, as the first 99-year period was due to expire the following year. The Department replied that he had been given no assurance that the lease would be renewed, but only that his rights under the lease would be recognized as far as this could legally be done. Disclaiming liability for payment of the penalty provided in the original lease for non-renewal, the Department refused to issue a renewal, provided McMaster with notice to quit the property, and later commenced action against him. In the Exchequer Court, Maclean J stated:

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[460] No cases have confirmed that a grant of reserve land under section 28 can be effective in the absence of such a permit, although in *Port Franks Properties v. The Queen*, [1981] 3 CNLR 86 at 95 (FCTD), the Court found that a surrender was lawful even though a lease was granted prior to formal surrender. Approximately one year later the Band made a formal surrender of the land at issue, and an order in council was then passed approving the surrender and confirming the lease.

[461] *R. v. McMaster*, [1926] Ex. CR 68.

> The proclamation of 1763, as has been held, has the force of a statute, and so far therein as the rights of the Indians are concerned, it has never been repealed. The proclamation enacted that no private person shall make any purchase from the Indians of lands reserved to them, and that all purchases must be on behalf of the Crown, etc. Throughout the subsequent years all legislation in the form of Indian Acts continued the letter and spirit of the proclamation in respect of the inalienability of Indian reserves by the Indians. As was said by Lord Watson in the ***St. Catherine Milling and Lumber Company*** case, since the date of the proclamation Indian affairs had been administered successively by the Crown, by the provincial governments, and since the passing of the British North America Act, 1867, by the Government of the Dominion. The policy of these administrations has been all along the same in this respect, that the Indian inhabitants have been precluded from entering into any transaction with a subject for the sale or transfer of their interest in the land, and have only been permitted to surrender their rights to the Crown by a formal contract duly ratified in a meeting of their chiefs or head men convened for the purpose. Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty, and as determined in the ***St. Catherine Milling and Lumber Company case***. There can be no doubt but that the property in question was part of an Indian Reserve covered by the proclamation. ***For these reasons I am clearly of the opinion that the lease to Thompson in 1817 was void***, and that the Indians never had such an interest in the lands reserved for their occupancy, that they could alienate the same by lease or sale. The Crown could not itself lease, or ratify any lease, made by the Indians of such lands at any time since the proclamation, save upon a surrender of the same by the Indians to the Crown. If the lease was void anything that the Department of Indian Affairs or any other authorized body or person administering Indian affairs did, or could do in the way of adoption or ratification of the same, would be contrary to the enactment of the proclamation and of the subsequent statutes relating to Indian affairs, and which in this respect were declaratory of the provisions of the proclamation and not binding on the Crown.[462]

Very similar facts were considered by the Supreme Court of Canada in ***Easterbrook v. The King***,[463] in which certain lands on Cornwall Island in the St Lawrence River were leased in 1821 by the British Indian Chiefs of St Regis to Solomon Y. Chesley. The document purported to lease the lands to Chesley for 99 years, "and at the expiration thereof for another and further like period of 99 years and so on until the full end and term of 999 years shall be fully ended and completed." The Department of Indian Affairs remained unaware of the lease until 1875, at which time, in response to an inquiry about the validity of the lease, Assistant Superintendent General Lawrence Vankoughnet confirmed that Chesley "has a right to sublet the land as he has been in the habit of doing for years." On the expiry of the initial 99-year period in 1920, however, the Department provided Chesley's successor with notice to quit, and refused to receive any further rent or to continue to recognize the tenancy. Newcombe J of the Supreme Court of Canada concluded that Audette J of the Exchequer Court had properly refused to uphold the lease:

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[462] ***R. v. McMaster***, [1926] Ex. CR 68 at 72-73. Emphasis added.
[463] ***Easterbrook v. The King***, [1931] SCR 210.

> The learned judge found no difficulty in disposing of the case, and I have no doubt that his conclusions must be maintained. By the formal judgment he declared that the lease of 10th March, 1821, was and is null and void *ab initio*, and that the King was entitled to recover forthwith the possession of the lands described with their appurtenances.[464]

The *McMaster* and *Easterbrook* cases clearly demonstrate the longstanding general policy of inalienability without the consent or permission of the Crown in situations in which a leasehold interest has ostensibly been granted by a band. Although subsection 28(1) of the 1970 *Indian Act* was not yet in force, the Courts nevertheless found the purported dispositions to be void.

By the time *R. v. Devereux*[465] appeared on the docket of the Supreme Court of Canada, subsection 28(1) *had* been enacted. In *Devereux*, the Court considered whether a non-Indian, Devereux, had rights to reserve land purportedly devised to him in a will by Rachel Ann Davis, the widow of a member of the Six Nations Band. Devereux had assisted Davis in working her farm commencing in 1934, at which time the two had entered into a private leasing arrangement. The Court viewed this arrangement as void under subsection 34(2) of the 1927 *Indian Act*, which was the legislative predecessor of subsection 28(1) of the 1952 statute. However, at the joint request of Davis and Devereux, the Crown had leased the property to Devereux for a period of 10 years expiring November 30, 1960, and then granted two successive permits to Devereux under section 28(2) of the *Indian Act* (as amended in

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[464] *Easterbrook v. The King*, [1931] SCR 210 at 218.
[465] *The Queen v. Devereux*, [1965] SCR 567.

1952) to use and occupy the lands for agricultural purposes. The second permit expired on November 30, 1962. In the meantime, Davis died and in her will purported to leave Devereux an ongoing right to possess and use the lands.

Since Devereux was not entitled to reside on a reserve, the Crown sought to remove him under the trespass provisions of section 31, and to dispose of Davis's interest by tender to eligible residents. In the subsequent proceedings, Thurlow J of the Exchequer Court dismissed the Crown's claim on the separate ground that an action to remove a trespasser from a reserve under section 31 of the Act must be commenced on behalf of the party having the right to possess the lands. Having concluded that the right to possession was vested in Band members Hubert Clause or Arnold and Gladys Hill, Thurlow J concluded that the Crown was in error when it initiated proceedings claiming possession on behalf of the entire Band.

However, the Supreme Court of Canada also held that Devereux had no right to possess or use the lands in question. Once the second permit expired, Devereux's interest in the land was governed by the provision in section 50 of the 1952 *Indian Act* that "[a] person who is not entitled to reside on a reserve does not by devise or descent acquire a right to possession or occupation of land in that reserve." Judson J for the majority (Cartwright J dissenting) held:

> The scheme of the *Indian Act* is to maintain intact for bands of Indians, reserves set apart for them regardless of the wishes of any individual Indian to alienate for his own benefit any portion of the reserve of which he may be a locatee. This is provided for by s. 28(1) of the Act. If s. 31 were restricted as to lands of which there is a locatee to actions brought at the instance of the locatee, agreements void under s. 28(1) by a locatee with a non-Indian in the alienation of reserve land would be effective and the whole scheme of the Act would be frustrated.
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> Reserve lands are set apart for and inalienable by the band and its members apart from express statutory provisions even when allocated to individual Indians. By definition (s. 2(1) (o)) "reserve" means
>
>> a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band.
>
> By s. 2(1)(a), "band" means a body of Indians
>
>> (i) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart. . .
>
> By s. 18, reserves are to be held for the use and benefit of Indians. They are not subject to seizure under legal process (s. 29). By s. 37, they cannot be sold, alien-

> ated, leased or otherwise disposed of, except where the Act specially provides, until they have been surrendered to the Crown by the band for whose use and benefit in common the reserve was set apart. There is no right to possession and occupation acquired by devise or descent in a person who is not entitled to reside on the reserve (s. 50, subs. (1)).
>
> One of the exceptions is that the Minister may lease for the benefit of any Indian upon his application for that purpose, the land of which he is lawfully in possession without the land being surrendered (s. 58(3)). It was under this section that the Minister had the power to make the ten-year lease to the defendant which expired on November 30, 1960.
>
> Under this Act there are only two ways in which this defendant could be lawfully in possession of this farm, either under a lease made by the Minister for the benefit of any Indian under s. 58(3), or under a permit under s. 28(2).
>
> Evidence was given of attempted arrangements between the defendant and the purchaser and the assignee of the purchaser under s. 50(2) which would have enabled the defendant to remain in possession at a rental which would have made it possible for the purchaser to make his installment payments. The Crown took the position that these attempted arrangements were irrelevant, the Department not having consented to any further lease or permit. This objection was properly taken and the attempted arrangements do not assist in any way the defendant's claim to remain in possession.[466]

The importance of the *Devereux* decision is in its finding that Crown consent in the guise of a lease or permit is a necessary condition precedent to occupation or use of reserve land.

M.D. Sloan Consultants Ltd. v. Derrickson[467] is a recent authority confirming the necessity of a written permit under section 28. In that case, the British Columbia Court of Appeal was asked to consider the effect of a purported agreement between a Band member (a "locatee") and a third party to lease a marina on reserve lands. The Court, after reviewing *Easterbrook* and *Devereux*, confirmed that the only way a locatee could validly grant an interest in reserve land to a third party was either by way of a permit under subsection 28(2) or a lease under subsection 58(3). Goldie JA stated:

> To the extent that the plaintiff's claims rest upon the validity of the lease arrangements of October 21, 1986, in respect to the use and occupation of the land portion of the Shelter Bay marina, they must fail. The policy behind s. 28(1) has been clearly stated by the Supreme Court of Canada: see *Easterbrook v. The King*, [1931]1 DLR

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[466] *The Queen v. Devereux*, [1965] SCR 567 at 572-73.

[467] *M.D. Sloan Consultants Ltd. v. Derrickson* (1991), 85 DLR (4th) 449 (BCCA).

> 628, [1931] SCR 210, and *The Queen v. Devereux* (1965), 51 DLR (2d) 546, [1965] SCR 567.
>
> In the *Devereux* case the defendant went into possession of a parcel of reserve land under an arrangement with a band member who was the locatee of the land. This arrangement was held to be void under s. 28(1) and afforded Devereux no right of possession and occupation after expiration of a lease from the Crown in his favor made under the provisions of s. 58(3). . . .
>
> But for s. 28(1) I would have concluded that the lease arrangement evidenced by the memorandum in writing dated October 21, 1986, supported Sloan's contention that it had a leasehold interest in the lands in question for a period of 10 years.[468]

In fact, the Court severed that portion of the agreement dealing with reserve lands and found the defendant Derrickson in breach of the remainder of the agreement dealing with chattels and non-reserve lands.

In neither *Devereux* nor *Derrickson* did the Courts indicate that lack of band consent was the determinative factor. Subsection 28(1) voids any attempt by a band to agree unilaterally to a grant of reserve land unless the necessary ministerial authorization is obtained. Therefore, the clear words of the subsection mean that even a clear intention on the part of a band, or a band member, will fail in the face of a lack of the necessary authorization by way of permit.

This approach to subsection 28(1) is supported by *Re Attorney-General of Nova Scotia and Millbrook Indian Band*,[469] in which the Nova Scotia Court of Appeal considered whether an agreement between the Band and a non-Indian, Ruth Rushton, purporting to allow occupation of reserve land was void by virtue of the operation of subsection 28(1). The Court placed great emphasis on the fact that there was no permit supporting the agreement between the Band and the occupier, and held that this deficiency rendered the agreement void:

> The reserve land on which the mobile park is situated is unsurrendered reserve land and the Minister of Indian Affairs and Northern Development has issued no permit authorizing the use or occupation of the land pursuant to s. 28(2) of the *Indian Act*, RSC 1970, c. I-6, and, in particular, has issued no permit authorizing the use or occupation of the land by Mrs. Rushton.
>
> Section 28(2) permits the Minister to authorize a person, not a member of the band, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve. It is a validating provision qualifying s. 28(1), which reads as follows:

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[468] *M.D. Sloan Consultants Ltd. v. Derrickson* (1991), 85 DLR. (4th) 449 at 455 (BCCA).

[469] *Re Attorney-General of Nova Scotia and Millbrook Indian Band* (1978), 93 DLR (3d) 230 (NSCA).

> 28(1) Subject to subsection (2), a deed, lease, contract, instrument, document or agreement of any kind whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.
>
> Any agreement by Mrs. Rushton with the Millbrook Indian Band respecting her occupancy of reserved land in the mobile park is clearly void by virtue of s. 28(1).[470]

The decision of Mahoney J of the Federal Court's Trial Division in *Springbank Dehydration Ltd. v. Charles*[471] further illustrates that the lack of a permit under subsection 28(2) voids an agreement attempting to convey a right of occupation and use of reserve lands. In that case, Mahoney J declined to grant an injunction to the plaintiff corporation on the basis that the statement of claim was predicated upon, but failed to disclose, an interest in certain reserve lands.

The plaintiff was the sublessee of about 400 acres of reserve land under a lease in which the Minister of Indian and Northern Affairs had covenanted that, if the head lease should be terminated, a new lease for the balance of the term of the sublease would be granted to the plaintiff. On June 26, 1976, the plaintiff and the Band entered into an agreement in writing whereby it was agreed that 160 acres of other reserve lands would be leased to the plaintiff in substitution for 180 acres of the leased lands, the resulting parcel of some 380 acres being referred to in the judgment as the "Consolidated lands." Soon thereafter, the head lessee decided to surrender its lease effective September 30, 1976, and on September 2, 1976, pursuant to his covenant, the Minister made an offer, open to September 29, 1976, to lease the original 400-acre parcel to the plaintiff. On September 28, the Band Council, by resolution, ratified, approved, and confirmed the agreement of June 26 and requested the Minister to grant a lease of the Consolidated lands to the plaintiff. Relying on the agreement of June 26 and the resolution of September 28, the plaintiff did not accept the Minister's offer and expended money on the Consolidated lands. No permit had been issued pursuant to subsection 28(2) of the *Indian Act*, however.

The Band then decided to go into business for itself on the Consolidated lands and the plaintiff commenced an action seeking, among other things, injunctive relief. Mahoney J. concluded:

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[470] *Re Attorney-General of Nova Scotia and Millbrook Indian Band* (1978), 93 DLR (3d) 230 at 231 (NSCA).

[471] *Springbank Deyhdration Ltd. v. Charles*, [1978] 1 FC 188 (TD).

> As I indicated at the close of the hearing, I am satisfied that, if the statement of claim discloses that the plaintiffs now have an interest in any of the lands, the injunction ought to issue in respect thereof.
>
> . . . The interest in the Consolidated lands depends entirely on the effect of the agreement of June 26, 1976 and the subsequent resolution of the Band Council. . . .
>
> *The agreement as to the Consolidated lands would appear to be clearly void by virtue of subsection 28(1). That matter has been dealt with too often to be open to any doubt in spite of apparent equities. Likewise, the resolution can have no effect, the agreement being void.*[472]

Because the plaintiff's claim for injunctive relief was premised entirely on its ability to establish a subsisting legal interest in the Consolidated lands, and because no such interest was made out, the injunction was not granted.

In its earlier reports dealing with the surrenders of reserve lands by the Kahkewistahaw and Moosomin First Nations, the Commission has had occasion to review at length the competing policies of autonomy and protection inherent in the *Indian Act*, and the discussion of those policies in cases like *Apsassin* and *Chippewas of Kettle and Stony Point*. The central principles in those cases have recently been renewed afresh in *Opetchesaht*, in which Major J, as already noted, stated:

> With the twin policies of autonomy and protection in mind, s. 37 and s. 28(2) reflect that, depending on the nature of the rights granted, different levels of autonomy and protection are accorded. Section 37 demonstrates a high degree of protection, in that the approval of the Governor in Council and the vote of all of the members of the band are required. This indicates that s. 37 applies where significant rights, usually permanent and/or total rights in reserve lands are being transferred. On the other hand, under s. 28(2), lesser dispositions are contemplated and the interest transferred must be temporary. It is evident from a review of this permit that it does not violate the balance between autonomy and protection struck by the *Indian Act*. This is not a case where surrender, with all of its administrative and legal impositions was required in terms of the overall policy of the *Indian Act*.[473]

On one hand, autonomy is achieved by respecting and honouring decisions that bands make with regard their reserve lands. On the other hand, protection of the Indian land base is achieved by requiring Crown consent to many transactions contemplated under the *Indian Act*. The scheme of the Act is to attempt to balance these competing policies by requiring both the band and the Crown to consent to dispositions of land. If a court were to uphold an agreement unilaterally entered into by a band or band member purporting to transfer an interest in reserve land without Crown consent, the entire underlying purpose of protecting the Indian land base against erosion would be frustrated. As the Commission recently stated in its report dealing with the claim of the Eel River Bar First Nation:

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[472] *Springbank Dehydration Ltd. v. Charles*, [1978] 1 FC 188 at 191 (TD). In reaching this conclusion, Mahoney J footnoted the *McMaster* and *Easterbrook* cases and the further decision of the Exchequer Court in *The King v. Cowichan Agricultural Society*, [1950] Ex. CR 448.

[473] *Opetchesaht Indian Band v. Canada* (1997), unreported, May 22, 1997 (SCC file no. 24161), p. 21, Major J.

> If use and occupation of reserve lands through means other than those specified in the *Indian Act*, including uses allowed solely by the Band, were sanctioned, the Crown would be released from its protective responsibility, contrary to the intent of the *Indian Act* and the policy that underlies it. Accordingly, unless the use and occupation has been authorized by the Crown in one of the forms contemplated by the Act – surrender, expropriation, or permit – the use and occupation of reserve land is contrary to the Act.[474]

With these considerations in mind, we must now consider the 1977 Band Council Resolutions and any written or oral agreement or agreements underlying them. These instruments must surely constitute one or more of the deeds, leases, contracts, instruments, documents, or agreements "of any kind whether written or oral" enumerated in subsection 28(1), and thus they must fall within the scope of this subsection. As a result, since no permits have ever been issued under subsection (2), but subject to our comments below, the clear terms of subsection (1) provide that the Band Council Resolutions and any underlying written or oral settlement agreements must be considered void.

Moreover, while it may have been arguable that the failure to issue permits in 1977 might be cured even at this late date by issuing them now, that option is not available in this case because the nature of the interest granted to the PFRA is not amenable to being authorized under subsection (2) in any event. The Commission is thus faced with the dilemma of a settlement that was wrongly conceived, but pursuant to which funds were paid over to the three western Bands and apparently spent by them.

Bearing in mind the Commission's earlier conclusion that a permit under subsection 28(2) could not be used to authorize the flooding of reserve lands given the scope of the interest involved, we would conclude that, but for subsection 28(1), the settlements evidenced by the 1977 Band Council

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[474] Indian Claims Commission, *Eel River Bar First Nation Inquiry: Report on Eel River Dam Claim*(Ottawa, December 1997), 116.

Resolutions would have been valid. However, subsection 28(1) drives us to the conclusion that the settlement was void insofar as it purported to permit the PFRA "to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve."

The next question we must consider is whether the settlement, which released the PFRA "from all past, present and future claims" arising from the flooding caused by the dams, is effective to preclude the QVIDA First Nations from claiming damages notwithstanding subsection 28(1) of the *Indian Act*.

Did the Band Council Resolutions Release Canada and the PFRA from Liability?

Powers of Band Councils

The QVIDA First Nations contend that, if the Commission concludes that the Band Council Resolutions were *not* void *ab initio*, only then does it become necessary to determine whether a Band Council Resolution can release a third party from liability. The corollary to the First Nations' assertion is that, if the Band Council Resolutions *were* void *ab initio*, it should be unnecessary to consider whether a Band Council Resolution can have such a releasing effect.

Canada's position is, of course, premised on the assumption that a Band Council Resolution *can* be used to release a third party from liability. It derives this conclusion from the principle that the ability to pursue an action is a power that is necessarily incidental to the powers expressly granted to a band council under the *Indian Act*. In its written submission, Canada stated:

> The court in *Whitebear Band Council* v. *Carpenters Provincial Council of Saskatchewan and Labour Relations Board of Saskatchewan*[475] describes the roles and powers of a band council as follows:
>
> > (iii) The nature of the Band Council
> > As *municipal councils* are "creatures" of the Legislatures of the Provinces, so *Indian band councils* are the "creatures" of the Parliament of Canada. Parliament in exercising the exclusive jurisdiction conferred upon it by s. 91(24) of the *British North America Act, 1867* to legislate in relation to "Indians and Lands Reserved for the Indians" enacted the *Indian Act*, RSC 1970, c. I-6, which provides – among its extensive provisions for Indian status, civil rights, assistance, and so on, and the use and management of Indian reserves – for the election of a

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[475] *Whitebear Band Council v. Carpenters Provincial Council of Saskatchewan and Labour Relations Board of Saskatchewan* (1982), 135 DLR (3d) 128 at 133 and 134 (Sask. CA).

> chief and 12 councillors by and from among the members of an Indian band resident on an Indian reserve. These elected officials constitute Indian band councils who in general terms are intended by Parliament to provide some measure – even if rather rudimentary – of local government in relation to life on Indian reserves and to act as something of an intermediary between the band and the Minister of Indian Affairs.
>
> More specifically s. 81 of the Act clothes Indian band councils with such powers and duties in relation to an Indian reserve and its inhabitants are usually associated with a rural municipality and its council: a band council may enact bylaws for the regulation of traffic; the construction and maintenance of public works; zoning; the control of public games and amusements and of hawkers and peddlers; the regulation of the construction, repair and use of buildings, and so on. Hence a band council exercises – by way of delegation from Parliament – these and other municipal and governmental powers in relation to the reserve whose inhabitants have elected it.
>
> I think it worth noting that the *Indian Act* contemplates a measured maturing of self-government on Indian reserves. Section 69 of the Act empowers the Governor in Council "to permit" a band to manage and spend its revenue moneys – pursuant to regulation by the Governor in Council – and by s. 83 the Governor in Council may declare that a band "has reached an advance[d] stage of development" in which event the band council may, with the approval of the Minister, raise money by way of assessment and taxation of reserve lands and the licensing of reserve businesses. Until then the band council derives its funds principally from the government of Canada. . . .
>
> In addition to their municipal and governmental function, band councils are also empowered, by the *Indian Act*, to perform an advisory role and in some cases to exercise a power of veto, with respect to certain activities of the Minister in relation to the reserve, including, the spending of Indian moneys, both capital and revenue, and the use and possession of reserve lands.
>
> Moreover, in light of the provisions of the single contribution agreement and some of the terms of the consolidated contribution agreement, it appears that in practice, Indian band councils from time to time act as agents of the Minister of Indian Affairs and representatives of the members of the reserve with respect to the implementation of certain federal Government programmes designed for Indian reserves and their residents – a complimentary role consistent with their function.

The powers of band councils to contract as a necessary incident of the powers expressly granted to them under the *Indian Act* is discussed directly in the decision of the Alberta Court of Queen's Bench in *Telecom Leasing Canada (TLC) Ltd. v. Enoch Indian Band of Stony Plain Indian Reserve No. 135*.[476] This case dealt with whether a band council could enter into a guarantee of a lease to a corporate lessee of certain road construction equipment. The court concluded that the band council was so authorized:

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[476] *Telecom Leasing Canada (TLC) Ltd. v. Enoch Indian Band of Stony Plain Indian Reserve No. 135*, [1993] 1 WWR 373, [1994] 1 CNLR 206 at 208 and 209 (Alta. QB).

> The more significant question is whether the band council had the power to enter into such an agreement on behalf of the band. The defendant submits that it did not. The defendant argues that the band council derives its powers solely from statute, and entering into a contract of guarantee is not among the powers enumerated in the *Indian Act*. Rather, the defendant argues, approval of the band as a whole and not just the council was needed.
>
> I disagree. Although the band council is clearly a creature of statute, deriving its authority solely from the *Indian Act* (*Paul Band (Indian Reserve No. 133)* v. *R*., [1984] 2 WWR 540, 29 Alta. LR (2d) 310 (sub nom. *R*. v. *Paul Indian Band*) [1984] 1 CNLR 87, 50 A.R. 190 (C.A.), at p. 549 [WWR, p. 94 CNLR], *it by necessity must have powers in addition to those expressly set out in the statute*. This was recognized by the British Columbia Supreme Court in *Lindley* v. *Derrickson* (March 29, 1976), [1978] CNLB (No. 4) 75, wherein it was held that a "band council must have the implied power to bring legal proceedings on behalf of the band" (p. 84). In this regard I accept the suggestion Jack Woodward advances in his book *Native Law* (Toronto: Carswell, 1989), at p. 166: . . .
>
>> It may be said that band councils possess at least all the powers necessary to effectively carry out their responsibilities under the *Indian Act*, even when not specifically provided for. There is an implied power to contract, without the need for authority in the *Indian Act*.

The British Columbia Supreme Court arrived at a similar conclusion in *Joe* v. *Findlay and Findlay*.[477] In this case the band council was attempting to recover possession of some reserve lands from a band member that had stopped paying rent. In response to the question of whether the band council had authority to pursue the action, the court states:

> To say that [the council] has the power to allocate reserve land but no status to recover possession when rights it has granted have expired would, it seems to me, be to deny the council the ability effectively to carry out this important function. Council cannot exercise the legal authority vested in it if it has not the status in law to bring such an action as this against those who overhold.

Accordingly, it is submitted that the band councils had the authority to, and did, bind their respective First Nations with respect to releasing Canada and the PFRA from all damages as set out in the correspondence and the BCRs.[478]

The QVIDA First Nations submitted that, if the Commission were to conclude that the Band Council Resolutions were not void *ab initio*, the case law suggests that a Band Council Resolution may be used for the purpose of releasing a third party from liability:

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[477] *Joe v. Findlay and Findlay* (1987), 12 BCLR (2d) 166, [1987] 2 CNLR 75 at 81 (BCSC).
[478] Submissions on Behalf of the Government of Canada, June 6, 1997, pp. 58-60.

> [W]hile a BCR cannot release Canada or the Band from their obligations under the Act, can a BCR release another party from liability to the First Nation? Case law has established that a Council of a First Nation can institute, prosecute and defend a legal action, and can bind a First Nation in a contractual sense.
>
> These cases suggest that if the BCRs releasing PFRA were validly passed by the Councils of the First Nations, they will likely be found to be binding on the First Nations. A release is essentially a contractual agreement by which one party, in return for valuable consideration, agrees to give up a claim against the other. The power to release a cause of action would be necessarily an attribute of the power to "institute, prosecute and defend a court action". In this case, the releases appear to have been entered into by the First Nations in return for the $265,000 in compensation from PFRA, and the First Nations appear to have been acting with legal advice. Based on these factors, it appears that the BCRs could bind the First Nations, in so far as they release PFRA from liability for past, present and future damages due to flooding.[479]

Although it appears that a band council may, by resolution, "institute, prosecute and defend a legal action, and can bind a First Nation in a contractual sense," in the Commission's view the question is by no means without doubt on the facts in this case. However, in light of our reasons that follow, it is not necessary for the Commission to decide the question here.

Extent of Release

Assuming that a band council can release a third party from liability for the unauthorized use and occupation of reserve land, it is questionable whether the Band Council Resolutions in this case release Canada generally from liability, or only the PFRA. The First Nations point to cases like *Apsassin* as authority for the proposition that the courts are "showing an increasing willingness to treat different arms of the federal government as distinct entities for purposes of determining liability to First Nations for past wrongs."[480] In *Apsassin*, the Supreme Court of Canada held that the Department of Indian Affairs was under a fiduciary obligation to undo a land transaction that had been discovered to be unfavourable to the Band, whereas no such obligation was explicitly imposed on the Veterans' Land Administration notwithstanding its status as another arm of the federal Crown. The QVIDA First Nations claim that the release in this case applies only to the PFRA. They say that, because Indian Affairs was only minimally involved in the settlement negotiations, it failed to uphold its fiduciary responsibility to ensure that the provisions of the *Indian Act* were complied with, and failed to protect the Bands' interests with regard to the foreseeable damage that would result from the erection of the Qu'Appelle Valley dams.

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[479] Submissions on Behalf of the QVIDA First Nations, May 5, 1997, pp. 68-69. In making the statement that "[c]ase law has established that a Council of a First Nation can institute, prosecute and defend a legal action, and can bind a First Nation in a contractual sense," the First Nations relied on the following authorities: *Wewayakum Indian Band v. Wewayakai Indian Band* (cited as *Roberts v. R)*, [1991] 3 FC 420 at 428-29 (TD), Addy J; *Telecom Leasing Canada (TLC) Ltd. v. Enoch Indian Band*, [1993] 1 WWR 373 at 376-77 (Alta QB), Wachowich J; *Gitanmaax Indian Band v. British Columbia Hydro and Power Authority* (1991), 84 DLR (4th) 562 (BCSC).

[480] Submissions on Behalf of the QVIDA First Nations, May 5, 1997, p. 69.

Canada takes a different view. Counsel argued that the *Prairie Farm Rehabilitation Act* simply set up a pool of money to be administered by the federal Minister of Agriculture to deal with drought and soil-drifting problems in Manitoba, Saskatchewan, and Alberta:

> Now the Minister of Agriculture is, of course, a minister of the government, just like the Minister of Indian Affairs or, at that time, the Minister of the Interior, and is Canada inasmuch as any Department of Her Majesty can represent Canada.[481]

In short, the argument is that, by releasing the PFRA, which is one arm of Canada, the QVIDA Bands released Canada.

In the Commission's view, it is not necessary to determine whether the First Nations are correct in their assertion that it is possible to sever the PFRA, to which the releases were granted, and pursue the unreleased remainder of the federal government. The real difficulty in this case centres on the fact that there is considerable doubt, based on the evidence before the Commission, whether the Pasqua, Muscowpetung, and Standing Buffalo First Nations suffered any damages for which they have not been fully compensated in 1977. Furthermore, to succeed on this ground, the First Nations would have to demonstrate that Canada was in breach of its fiduciary obligations by failing to protect them from entering into an exploitative bargain with the PFRA. In our assessment of the evidence, it is difficult to see how this transaction could be characterized as exploitative in either the procedural sense of the word or in the end result.

Presumably, in the context of the 1977 settlement negotiations between the PFRA and the western QVIDA Bands, Canada's obligation was to ensure that those dealings did not result in a transaction that was, in the words of McLachlin J in *Apsassin*, foolish or improvident and thus exploitative of the

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[481] ICC Transcript, June 26, 1997, pp. 119-20 (Bruce Becker).

Bands. In this case, the Bands had the benefit of independent legal advice. Indeed, Indian Affairs was asked to stay out of the negotiations because it was believed that lawyer Roy Wellman would not be limited in the way the Department would be, and that he would be better able to plead the Bands' case. To Wellman's credit, he was successful in negotiating a settlement of $265,000, which was roughly 10 times higher than the PFRA's opening position and double its "confidential" position. In fact, the final settlement figure of $265,000 was proposed by the Bands in the first place. It is difficult to understand how Canada, having seen that the Bands received the benefit of independent legal advice, and having reviewed the settlement and accepted the recommendation of the Department of Regional Economic Expansion that the settlement was "reasonable and justifiable," can be said to have failed in fulfilling its fiduciary obligations to the Bands. In this context, we find the following words of Urie JA in the *Kruger* case to be apt:

> In essence, however unhappy [the members of the First Nation] were with the payments made, they accepted them. The payments were for sums which could be substantiated by the independent valuations received by both parties and which were determined after extensive negotiations and forceful representations on the Indians' behalf by the Indian Agent and other high officials of the Indian Affairs Branch. *If the submissions advanced by the appellants were to prevail, the only way that the Crown could successfully escape a charge of breach of fiduciary duty in such circumstances would have been, in each case, to have acceded in full to their demands or to withdraw from the transactions entirely. The competing obligations on the Crown could not permit such a result.* The Crown was in the position that it was obliged to ensure that the best interests of all for whom its officials had responsibility were protected. The Governor in Council became the final arbiter. *In the final analysis, however, if the appellants were so dissatisfied with the expropriations and the Crown's offers, they could have utilized the Exchequer Court to determine the issues.* For whatever reasons, they elected not to make these choices. They accepted the Crown's offers and, at least *in the case of Parcel B, the offer was at the figure which they had suggested.* I fail to see, then, how they could now successfully attack, after so many years, the settlements to which they agreed.[482]

Kruger was clearly decided in the context of an expropriation, with independent valuations and forceful representations on the Band's behalf by officials in Indian Affairs. Despite the obvious differences in *Kruger*, there are important analogies to the facts before us. First, the QVIDA Bands had independent legal advice from Wellman, who forcefully represented their interests throughout the negotiations leading up to the 1977 settlement. Second, the Bands also could have rejected the 1977 settlement in favour of a litigated resolution, but chose not to do so. Finally, J.D. Leask, Indian Affairs' Director General for the Saskatchewan Region, reviewed the settlement and concluded that it was "fair and just."

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[482] *Kruger v. The Queen*, [1985] 3 CNLR 15 at 51 (FCA), Urie JA.

The only manner in which it might be said that Indian Affairs fell short was in the fact that no independent valuations were obtained by either party. It will be recalled that the parties had initially agreed to proceed by having the PFRA prepare engineering assessments to quantify the areas affected. The Bands later asked to proceed in the absence of such assessments to avoid prolonging the process and incurring greater expense. In the result, the valuation chosen was the Bands' own figure, to which the PFRA initially made strident objection. Ultimately, to use the language of Urie JA in *Kruger*, the PFRA "acceded in full" to the Bands' proposed terms. The PFRA rationalized the Bands' proposal as "reasonable and justifiable" by claiming to have paid the "present value of lost returns to the land between 1943 and the present [1977]," and fair market value for the flooded areas with regard to future damages, but clearly the settlement represented the Bands' figure. With these circumstances in mind, we would be hard pressed to conclude that the absence of independent valuations operated to the Bands' detriment in 1977.

Severability of the 1977 Settlement

Even if the 1977 settlement was fair and reasonable, subsection 28(1) renders void any agreement whether written or oral "by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve." What, then, are we to make of a settlement that contemplates damages for past trespasses as well as compensation and permits for future use and occupation, particularly where proceeding by way of such a permit was, in our view, invalid? Moreover, what is the effect of the money actually having been paid by the PFRA to the benefit of the Bands, and having been spent by them? Finally, what is the effect of the Bands having passed later Band Council Resolutions purporting to rescind the resolutions adopting the settlement?

We will address the last question later in this report. With regard to the first two questions, we believe that the issue to be decided is whether subsection 28(1) of the *Indian Act* renders the entire 1977 settlement void, or whether parts of the settlement can be severed and can remain effective notwithstanding the fact that other parts of the settlement are clearly illegal and thus void.

To understand the effect of the words in subsection 28(1) that render an agreement "void" unless the requirements of subsection 28(2) have been met, it is instructive to consider the following analysis by G.H.L. Fridman regarding "illegal" contracts:

> - Invalidity through illegality. . . .
>
> (b) Illegality and other kinds of invalidity. . . .
> A contract for a purpose regarded by the law as improper, though it conforms to all other requirements of a valid transaction, will lack essential validity, and, therefore, will be void. Invalidity through illegality refers to the infringement by a contract of some statute or doctrine of the common law relating to the purpose or object to be achieved by such contract. The term "illegality", in this sense, does not mean "criminal". An illegal contract, though invalid and therefore void, does not necessarily involve the contracting parties in liability for criminal conduct. However, the term "illegality" has been used to cover contracts which may have consequences in the criminal law, under the Criminal Code in Canada (or under statute or the common law in England), as well as the consequence of contractual invalidity.
>
> (c) Illegality and voidness
>
> In the history of contracts which are invalid at common law the courts have frequently used the expression "illegal" to mean not only a contract which is undoubtedly illegal under statute or under one of the heads of public policy to be examined later, but also a contract which at common law is not completely and truly illegal. As clarified by Denning L.J. in the English case of *Bennett v. Bennett*,[483] some of these "illegal" contracts at common law were not, and are not now, illegal in the fullest sense. They are really void to the extent of their illegality, but may be enforced as to the rest, if the illegal part can be severed from the legal. Thus, a contract in restraint of trade is void, but not illegal; insofar as it is possible to excise the illegal restraint from the rest of the contract, this will be done. In the more sophisticated language and ideas of the twentieth century, contracts may be invalid, in whole or in part, without being illegal, and such invalidity may arise under statute or by virtue of the common law. Canadian cases, however, do not appear to make the same subtle distinctions. They seem to use the phrases "illegal" and "void" interchangeably, and to make no real differentiation between different classifications of invalidity, even though they have accepted and apply the English doctrines as to severability in relation to contracts in restraint of trade and others, upon the basis of which the distinction between voidness and illegality may be said to rest. . . .
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> One distinction does merit recognition, and that is the distinction between invalidity under statute and by virtue of the common law. There are sufficient differences between the nature of the invalidity in question and the operation of the relevant

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[483] *Bennett v. Bennett*, [1952] 1 KB 249 at 160 (CA).

> doctrines to justify classification of the types of invalidity in accordance to whether the source is some statute or some rule of the common law.
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> 2. Statutory illegality
>
> (a) Prohibition by statute
>
> In this context the statutes concerned are not *per se* criminal, that is, the Criminal Code. They are statutes of a regulatory nature, the infringement of which may involve illegality. The prohibition of a contract by such a statute renders the contract void and of no effect. . . .[484]

In the present case, there is no question that subsection 28(1) of the *Indian Act* gives rise to the sort of statutory illegality contemplated by Fridman. Unless the requirements of subsection 28(2) have been satisfied, an agreement by which a band or a member of a band purports to permit a person other than a member of that band to occupy or reside or otherwise exercise any rights on a reserve is void, at least to the extent of its illegality. However, the balance of such agreements may be enforced, if, to use Fridman's words, "the illegal part can be severed from the legal."

On the question of severance, Fridman continues:

> A . . . very important qualification of the doctrine of the voidness of illegal contracts is the idea of *severance*. Sometimes a court will recognize the separation of valid from objectionable parts of a contract, and, while refusing to enforce the latter, will give effect to the former. In this connection it should be mentioned that the argument that there is a distinction between illegal and void (but not illegal) contracts, whether by statute or common law, may depend upon the application of the idea of severance. If the consideration for a promise or set of promises is illegal, then all the promises which rest on, or are dependent upon such consideration will be invalid. If some of the promises are dependent upon such illegal consideration, whether illegal at common law or under statute, while others have an independent existence, and rest upon consideration which is not itself illegal, then such independent promises may be enforceable against the other party. This distinction lies at the root of the illegal-void dichotomy. To quote from one English case which is said to support this
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> > . . . there are two kinds of illegality of differing effect. The first is where the illegality is criminal, or *contra bonos mores*, and in those cases . . . such a provision, if an ingredient in a contract, will invalidate the whole, although there may be other provisions in it. There is a second kind of illegality which has no such taint; the other terms in the contract stand if the illegal portion can be severed, the illegal portion being a provision which the court, on the grounds of public policy, will not enforce.[485]

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[484] G.H.L. Fridman, *The Law of Contract in Canada*, 2^d ed. (Toronto/Calgary/Vancouver: Carswell, 1986), 321-25.

[485] *Goodinson v. Goodinson*, [1954] 2 QB 118 at 120-21 (CA), Somervell LJ.

> It is suggested, by way of response, that in reality the test of the effect of the contract, in terms of its being wholly illegal or only partially void, must depend upon: (1) the policy of the common-law rule or statutory provision that is invoked, namely, can it be limited in its scope and application; and (2) whether, in the circumstances, not only is the contract one that is potentially severable, but severable in fact, having regard to the way the parties have contracted. Thus, the operation of the doctrine of severance rests upon its applicability to the type of contract that is in issue, as well as upon the practical question whether the particular contract before the court, though potentially severable, admits of severance.[486]

Therefore, to determine whether the 1977 settlement must be considered wholly illegal or only partially void, it would be necessary to consider, first, whether the scope and application of subsection 28(1) can and should be limited, and, second, whether the settlement itself is severable in fact, having regard to the manner in which the parties have contracted.

However, in light of the positions the parties have taken in this inquiry, it would be premature for the Commission to decide these questions at this stage. Neither party has addressed the important question of severability of contractual terms in its written submission because each has taken an "all or nothing" approach – Canada seeking to uphold the entire settlement, and the QVIDA First Nations submitting that it should be declared entirely void.

As already stated, the Commission is of the view that Canada's position cannot be sustained. By virtue of subsection 28(1), the settlement must be either completely void, as the First Nations contend, or, if the settlement is severable, it is at the very least void in relation to the proposed permit and any pre-paid damages from 1977 into the future.

Assuming, without deciding the point, that the entire 1977 settlement is void, and assuming that the dams will continue to remain in place, it will be necessary for the parties to enter into negotiations to obtain the proper authority to flood reserve lands and to determine whether any compensation is still owed to the QVIDA First Nations on account of damages from the 1940s to the present and into the future. In that event, the position of Pasqua, Muscowpetung, and Standing Buffalo would be no different from that of Sakimay, Cowessess, and Ochapowace, except to the extent of the set-off to be factored into the negotiations. Any amount negotiated with regard to Muscowpetung, Pasqua, and Standing Buffalo would have to set off $265,000 in 1977 dollars, whereas a settlement with the three eastern First Nations would have to reflect the compensation of $3330 paid to them in 1943, less the $60 credited to the Cowessess Indian Residential School.

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[486] G.H.L. Fridman, *The Law of Contract in Canada*, 2^d^ ed. (Toronto/Calgary/Vancouver: Carswell, 1986), 399-401.

Alternatively, and again without deciding the point, if the portion of the settlement dealing with the damages for trespass before 1977 can be severed and remain in effect, it will still be necessary for the three western First Nations to renegotiate compensation from 1977 to the present and into the future. It is true that the effect of severing the settlement in this fashion would be to reduce by 35 years the period with respect to which compensation must be renegotiated, again subject to set-off of some portion of the compensation already paid in 1977. However, the important point is that, regardless of whether the settlement is severable, further negotiations between Canada and the three western First Nations seem inevitable in view of the fact that subsection 28(2) of the *Indian Act* could not be used to grant authority to the PFRA to flood reserve lands in the Qu'Appelle Valley. Similarly, since it was not open to Canada to authorize use and occupation of reserve lands commencing in the early 1940s under section 34 of the 1927 *Indian Act*, negotiations with the three eastern First Nations are likewise required.

Because we are without the benefit of argument on the question of severability, we do not know whether the parties differ on this issue. We assume that the three western First Nations will continue to assert that the 1977 settlement should be considered entirely void. However, it is not inconceivable that Canada might also wish to take this position in preference to severing the settlement if it believes that the compensation paid in 1977 adequately compensated the First Nation for its damages. Since all six First Nations participating in this inquiry will in any event be required to negotiate or renegotiate some or all aspects of the compensation paid to them, we recommend that the question be resolved in the following fashion.

Unless Canada chooses to remove the control structures at Echo Lake, Crooked Lake, and Round Lake, it should take immediate steps to secure the necessary land rights required from all six participating First Nations to continue the operation of those structures. Whether it chooses to acquire the fee simple or some lesser interest such as a right of way should be based on two considerations: ensuring that the interest acquired from each First Nation is sufficient to achieve the objectives for which that interest is acquired, while at the same time (to quote from the Commission's decision in the Sumas inquiry) doing "as little injury as possible to the Indians' interests."[487] Similarly, whether Canada acquires the required interests in land by surrender – assuming that the First Nations would be prepared to consent – or expropriation is a decision best left to Canada after weighing and balancing the various interests of the First Nations with those of the other parties that Canada must consider.

Canada and the six First Nations should also negotiate the remaining compensation, if any, payable to the First Nations for the use and occupation of the lands flooded by the control structures. As noted, the compensation paid to the three western Bands in 1977, and the use and occupation of their reserve lands by Canada since the early 1940s, should be factored into the compensation payable. Similarly, the compensation paid to the eastern Bands in 1943, and the PFRA's use and occupation of the lands since that time, should be factored into the compensation payable to those First Nations. If Canada and the western First Nations are unable to agree on whether the period from the early 1940s to 1977 can be severed and treated as settled, or if any First Nation is otherwise unable to agree with Canada on the outstanding compensation, if any, owed to that First Nation, it is open to the parties to bring those issues back before the Commission for its recommendation following the submission of appropriate evidence and argument.

Could the Bands Rescind the 1977 Band Council Resolutions?

The QVIDA First Nations argue by analogy to municipal law that, "where a body is delegated the power to pass bylaws or resolutions, that power includes the power to repeal the bylaws and resolutions," subject to restrictions where repealing a bylaw or resolution would affect "vested rights of third parties." In this case, the First Nations contend that, while it might appear that the PFRA had vested rights as a result of the preceding construction and operation of the Echo Lake dam, the PFRA should not be protected by the vested rights doctrine since the 1977 Band Council Resolutions did not *create* vested rights and the flooding before 1977 was not authorized. Therefore, in the First Nations' submission, it should have been open to them to rescind the 1977 Band Council Resolutions as they subsequently purported to do.

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[487] Indian Claims Commission, *Sumas Inquiry: Report on Indian Reserve #6 Railway Right of Way Claim* (Ottawa, February 1995), 4 ICCP 3 at 40. As already noted, this principle was affirmed by the Federal Court of Appeal on June 24, 1997, in *Semiahmoo Indian Band v. Canada* (unreported), [1997] FCJ No. 842.

If the 1977 settlement was entirely void *ab initio* under subsection 28(1) of the *Indian Act*, as the First Nations submit, this issue becomes academic since it would not have been necessary for the Bands to issue rescinding Band Council Resolutions to render the earlier resolutions ineffective. However, to the extent, if any, that the 1977 settlement can be considered valid under section 28 of the *Indian Act*, the Commission agrees with counsel for Canada that the 1977 Band Council Resolutions were merely one form of evidence of an agreement between the PFRA and the western Bands regarding the settlement of damages for past flooding as well as the compensation and permits for future use and occupation of reserve lands. Other documents – such as correspondence among the parties, payment of the sum of $265,000 by the PFRA to Indian Affairs for deposit to the respective Bands' trust accounts, and the receipt and expenditure of those funds by the Bands – would represent substantial evidence of this agreement even in the absence of the 1977 Band Council Resolutions.

We do not consider the execution of these Band Council Resolutions by the Bands as an exercise of their legislative power to pass bylaws or resolutions, but rather as independent evidence of an intention to enter into a contract. As parties to a contract, the Bands are subject to the ordinary principles of offer and acceptance, consideration, capacity and so forth, assuming that such principles apply to this *sui generis* field of law. To permit one party to an agreement to withdraw unilaterally from that agreement without the concurrence of the other party would be contrary to basic principles of contract law.

Therefore, regardless of whether the 1977 settlement was valid in part or entirely void, we conclude that the rescinding Band Council Resolutions are irrelevant for the purposes of determining the interests of the parties in this case.

Conclusions

To summarize, the Commission concludes that it was not open to Canada in the early 1940s to authorize the PFRA under section 34 of the 1927 *Indian Act* to use and occupy reserve lands of the six participating QVIDA First Nations for flooding purposes. That being the case, the purported authorizations granted by Canada at that time must be considered ineffective, such that the PFRA has been in trespass on the eastern reserve lands ever since, and on the western reserve lands until at least 1977.

With regard to the western First Nations, the 1977 settlement was void *ab initio* under subsection 28(1) of the *Indian Act*, either entirely or at minimum with respect to that portion of the settlement relating to the permits and damages for future use and occupation looking forward from 1977. In any event, the nature and duration of the future right to use and occupy reserve land, as intended by the parties to be granted by the settlement, fell outside the scope of the permits authorized by subsection 28(2). The effect of these conclusions is that the PFRA remained in trespass on the Muscowpetung, Pasqua, and Standing Buffalo reserves after 1977. However, whether the portion of the settlement dealing with pre-1977 trespasses can be severed and operate independently is an issue the parties should negotiate. If they are unable to settle that issue or any other question relating to the quantum of compensation arising out of the PFRA's unauthorized use and occupation of reserve lands, it is open to the parties to return to the Commission for a further inquiry into such matters.

ISSUE 5 ABORIGINAL, TREATY, AND RIPARIAN WATER RIGHTS

Did those QVIDA First Nations with reserves adjacent to or on both sides of the Qu'Appelle River and lakes have common law riparian water rights, including rights to the river beds? If so, did the Crown have an obligation to ensure that these water rights were protected under the *North-West Irrigation Act*, 1894, and the *Dominion Power Act*, and to act in the First Nations' best interests when those rights might be affected? Moreover, did the Crown act in the best interests of the QVIDA First Nations when it authorized the PFRA to construct control structures that altered the First Nations' riparian interests and caused consequential losses?

As the final aspect of their claim, the QVIDA First Nations claim to retain aboriginal title and treaty rights to the bed and waters of the Qu'Appelle River adjoining their respective reserves, in addition to the riparian rights accruing at common law to those in possession of land adjacent to a body of water. The parties agree that riparian rights include the right of access to the water; the right of drainage; rights relating to the flow, quality, and use of water; and the right of accretion. The First Nations also contend that the Qu'Appelle River is non-navigable, meaning that, by virtue of the common law principle of *ad medium filum aquae*, a presumption arises that the First Nations, as holders of riparian rights, also own the bed of the river and lakes to the centre line (where a given First Nation owns land on one side of the body of water) or the entire bed (where a First Nation owns land on both sides of the body of water).

In the first instance, the First Nations contend that Canada's implementation of the *North-West Irrigation Act* in 1894 did not demonstrate the necessary "clear and plain intention" that case authorities may indicate is required to extinguish their aboriginal, treaty, and riparian rights. Alternatively, if their interests *were* damaged by Canada's implementation of the *North-West Irrigation Act* and its failure to protect those interests by licensing the Bands' rights to use water for "domestic, irrigation and other purposes," then the First Nations argue that Canada breached fiduciary obligations to them. Further breaches arose, in the First Nations' submission, when Canada failed "to protect those treaty and riparian interests which were not forfeited by the *North-west Irrigation Act*, in permitting the flooding to take place which resulted in not only economic losses but a loss of treaty hunting, fishing and trapping rights."[488]

Counsel for Canada was perplexed by the First Nations' claim under this heading and contended that, for the following reasons, the Commission should find no outstanding lawful obligation owing by Canada for breach of the First Nations' water rights:

- The role of the Commission, Canada submits, is to assess whether a claim is "eligible for negotiation" – in other words, "a claim must show *some loss or damage that is capable of being negotiated under the [Specific Claims] Policy*."[489] The Commission's mandate does *not* permit it to issue declarations of legal rights or legal opinions concerning rights that are not brought directly into issue by the loss or damage that forms the subject matter of the claim.

- The claim in this inquiry is for loss of income from farming, hay production, wood products, hunting, and trapping as a result of damage caused by permanent and semi-permanent flooding of reserve lands. Canada contends that the First Nations' claim does not disclose which riparian rights were affected by the *North-West Irrigation Act*, nor how a licence issued under the Act would have preserved the rights claimed to have been affected. Moreover, Canada further questions how the losses alleged relate to the water rights claimed, and "how any such damages differ from the

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[488] Submissions on Behalf of the QVIDA First Nations, May 5, 1997, p. 77.

[489] Submissions on Behalf of the Government of Canada, June 6, 1997, p. 61. Emphasis added.

> damages that are already being claimed as a result of the alleged illegal flooding of the reserves."[490] Even if the Commission should find a breach of the Bands' water rights giving rise to a separate cause of action, Canada submits that there is still only one set of damages eligible to be compensated, whether it be under the water rights claim or under the preceding claims for illegal use of reserve lands or breach of fiduciary duties.

In rebuttal, the First Nations added that they lost the ability to use the waters of the Qu'Appelle River in the same manner as they had prior to the erection of the dams, owing to pollution and other factors. Counsel also noted that there could be other damages besides those contemplated by the first four issues in these proceedings, such as special damages and punitive damages.[491]

In the Commission's view, it is unnecessary to address this issue in light of our findings earlier in this report. Canada contends that any sustainable claims by the First Nations arising out of aboriginal, treaty, or riparian water rights appear to represent alternative causes of action giving rise to the same damages dealt with in our comments relating to Canada's inappropriate use of section 34 of the 1927 *Indian Act*. If that is the case, then to the extent the PFRA and its successors can be shown to have interfered with the Bands' riparian or other water rights – whether rights of drainage, water quality, or others in the catalogue of such rights – as a result of the erection and operation of the Qu'Appelle Valley dams, we are of the opinion that the First Nations are entitled to claim compensation from the PFRA for the damages caused by that interference. Those damages must be assessed with caution to ensure that there is no element of "double counting" in compensating the First Nations for their losses arising under alternative causes of action. Care must also be taken in considering the compensation of $3270 paid to the Cowessess, Ochapowace, and Sakimay Bands in 1943 and the settlement for $265,000 with the Muscowpetung, Pasqua, and Standing Buffalo Bands in 1977 to prevent duplicate awards for the same damages. Canada takes the position that all the First Nations have received all the compensation to which they are entitled, subject to further investigations being undertaken regarding the fairness of the $3270 paid to the eastern Bands in light of the possible limitations in P.A. Fetterly's abilities as an appraiser. While we are not prepared at this stage to conclude that the First Nations have been fully compensated, we recognize that such a finding represents one possible outcome of the steps we recommend the parties take at this time.

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[490] Submissions on Behalf of the Government of Canada, June 6, 1997, p. 62.

[491] ICC Transcript, June 26, 1997, pp. 216-18 (David Knoll).

Near the end of the oral session, counsel for the First Nations in rebuttal raised the question of damages caused by pollution. The evidence before us is equivocal at best as to whether raising the water levels in the Qu'Appelle Valley has had the effect of increasing or mitigating pollution levels. On one hand, some of the elders testified that water quality has decreased as the dams have impeded the flow of the river and its natural "flushing" action. On the other hand, there is documented historical evidence to show that, during long periods of drought in the 1930s and at other times, low water levels contributed to stagnation, leading to requests for dams to increase water levels and enhance the diluting effects of having more water in the system. There is also some technical evidence to suggest that all river systems have a natural cycle in which they tend to become increasingly filled with sediment, algae, and other natural "contaminants" over the course of time, although this process "can be accelerated by human activities which increase the rate at which nutrients are contributed to the water."[492] Without better evidence to demonstrate how pollution levels have changed and how those levels can be linked to the construction of the Echo Lake, Crooked Lake, and Round Lake dams and other control structures in the Qu'Appelle Valley, we are unable to decide this point.

Finally, we do not believe it is necessary to comment on Canada's alleged failure to obtain licences in a timely manner to protect the Bands' riparian or other water rights following Canada's passage of the *North-West Irrigation Act* in 1894. As counsel for Canada argued, such licences appear to deal with rights of consumption for domestic, agricultural, and other purposes, and no damages arising from the failure to protect such consumptive rights have been demonstrated to the Commission. For this reason, we will refrain from deciding whether riparian or other water rights were extinguished by the *North-West Irrigation Act* or other statutes, or whether the Crown failed to protect these rights, such as they may be, on behalf of the Bands.

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[492] E.E. Gillespie, Regional Engineering and Architectural Advisor, Department of Indian and Northern Affairs, to W.A.S. Barnes, District Supervisor, Touchwood File Hills Qu'Appelle District, Department of Indian and Northern Affairs, March 19, 1975, DIAND file 675/8-4, vol. 3 (ICC Documents, p. 966); Canada-Saskatchewan-Manitoba, "Report of the Qu'Appelle Basin Study Board," 1972 (ICC Exhibit 22, p. 13).

PART V

FINDINGS AND RECOMMENDATIONS

FINDINGS

The Commission has been asked to inquire into and report on whether the Government of Canada properly rejected the specific claim of the QVIDA First Nations. In assessing the validity of the claim, we have considered the following issues:

1 Could the Crown authorize the PFRA under section 34 of the *Indian Act*, 1927, to use and occupy reserve lands for flooding purposes? If so, was the PFRA so authorized? If not, did Canada breach its fiduciary obligations to the QVIDA First Nations by failing to obtain proper authorization under the Act?

2 If Canada could and did properly authorize the PFRA under section 34 of the *Indian Act*, 1927, to use and occupy reserve lands for flooding purposes, did the Crown nevertheless have a fiduciary obligation to consult or otherwise consider the best interests of the QVIDA First Nations before proceeding?

3 Did the terms of Treaty 4 preclude the Crown from relying on section 34 of the *Indian Act*, 1927, or otherwise require the consent of the QVIDA First Nations to authorize the PFRA to use and occupy reserve lands for flooding purposes?

4 Did the Band Council Resolutions signed by the Pasqua, Standing Buffalo, and Muscowpetung First Nations in the 1970s effectively release the Crown and the PFRA from all past, present, and future claims for damage caused by the Echo Lake control structure built in the 1940s?

5 Did those QVIDA First Nations with reserves adjacent to or on both sides of the Qu'Appelle River and lakes have common law riparian water rights, including rights to the river beds? If so, did the Crown have an obligation to ensure that these water rights were protected under the *North-West Irrigation Act*, 1894, and the *Dominion Power Act*, and to act in the First Nations' best interests when those rights might be affected? Moreover, did the Crown act in the best interests of the QVIDA First Nations when it authorized the PFRA to construct control structures that altered the First Nations' riparian interests and caused consequential losses?

Our findings are summarized as follows.

Issue 1: Section 34 of the *Indian Act*, 1927

Canada acknowledged that it had not acquired the right to use and occupy reserve lands of the QVIDA First Nations by way of expropriation or surrender, so the question that remained was whether such use and occupation could be authorized by the Superintendent General of Indian Affairs under section 34 of the 1927 *Indian Act*. Based on the reasoning of the Supreme Court of Canada in *Opetchesaht*, the Commission concludes that, even if section 34 is assumed to be an *enabling* provision rather than merely prohibitory, the rights conveyed to the PFRA were too extensive, exclusive, and permanent to be authorized under section 34. Moreover, unlike subsection 28(2) of the later *Indian Act* considered by the Court in *Opetchesaht*, section 34 does not contemplate consent by either a band or a band council, meaning that it should be interpreted even more narrowly than subsection 28(2).

Since section 34 did not form an appropriate basis for authorizing use and occupation of reserve lands for flooding purposes in this case, it was not necessary for the Commission to consider whether Canada actually did authorize the PFRA to use and occupy reserve lands under the section. Therefore, it was necessary for the PFRA to acquire by surrender or expropriation the right to use and occupy reserve lands for flooding purposes. Having failed to do so, the PFRA has trespassed on the reserve lands of all six participating First Nations from the early 1940s to at least 1977, and on the reserve lands of the Sakimay, Cowessess, and Ochapowace First Nations to this day. The impact of the 1977 settlement on the PFRA's use and occupation of the reserve lands of the Muscowpetung, Pasqua, and Standing Buffalo First Nations is addressed below.

Issues 2 and 3: Canada's Fiduciary and Treaty Obligations

Given that the Commission has concluded that it was inappropriate for Canada to authorize the PFRA to use and occupy reserve lands for flooding purposes under section 34 of the 1927 *Indian Act*, it is unnecessary to determine whether Canada breached a fiduciary or treaty obligation to consult or otherwise consider the best interests of the QVIDA First Nations before proceeding.

Issue 4: Effects of the 1977 Band Council Resolutions

For the same reasons that we concluded that it was not open to Canada to authorize the use and occupation of reserve lands for flooding purposes under section 34 of the 1927 *Indian Act*, Canada could not authorize such use and occupation under subsection 28(2) of the 1970 *Indian Act* as part of the 1977 settlement discussions with Muscowpetung, Pasqua, and Standing Buffalo. The present case is distinguishable from *Opetchesaht* and the Eel River Bar First Nation inquiry because of the more extensive, exclusive, and permanent interest granted to the PFRA than to the British Columbia Hydro and Power Authority and the New Brunswick Water Authority in those other cases. Moreover, the 1977 settlement was void *ab initio* under subsection 28(1) of the *Indian Act*, either entirely or at minimum with respect to that portion of the settlement relating to the permits and damages for future use and occupation looking forward from 1977. The effect of these conclusions is that the PFRA remained in trespass on the Muscowpetung, Pasqua, and Standing Buffalo reserves *after* 1977. The question of whether any pre-1977 trespasses were settled by the 1977 settlement depends on whether the Band Councils had the power to enter into binding settlements with respect to the unauthorized use and occupation of reserve lands and whether the release clause in the 1977 Band Council Resolutions can be severed from those portions of the agreement rendered void by subsection 28(1) of the *Indian Act*.

Unless it chooses to remove the control structures at Echo Lake, Crooked Lake, and Round Lake, Canada should immediately commence negotiations to obtain, whether by surrender or expropriation, the interests in land it requires for flooding purposes from all six reserves. Canada should also commence negotiations to determine the remaining compensation, if any, payable to the Sakimay, Cowessess, and Ochapowace First Nations for flooding damages since the 1940s, taking into account the $3270 received by those First Nations as compensation in 1943. Similarly, Canada should commence negotiations to determine the remaining compensation, if any, payable to the Muscowpetung, Pasqua, and Standing Buffalo First Nations for flooding damages to those reserves, again taking into account the compensation of $265,000 paid to the three First Nations under the terms of the 1977 settlement. Whether the settlement entered into by the Band Councils in relation to damages prior to 1977 is binding on the respective Bands, and whether this part of the agreement can be severed and can operate independently to settle the damages arising during that period, are issues the parties should negotiate. If they are unable to settle those issues or any other question relating to the quantum of compensation arising out of the PFRA's use and occupation of reserve lands, the parties may return to the Commission for a further inquiry into such matters.

The Band Council Resolutions by which the three western Bands purported to rescind the 1977 Band Council Resolutions and the settlement are irrelevant to these proceedings. If the 1977 settlement was entirely void *ab initio* under subsection 28(1) of the *Indian Act*, this issue is academic, since it would not have been necessary for the Bands to issue rescinding Band Council Resolutions to render the earlier resolutions ineffective. However, to the extent, if any, that the 1977 settlement can be considered valid under section 28 of the *Indian Act*, the 1977 Band Council Resolutions were merely evidence of the intention to enter into a contract. As such, it would be contrary to basic principles of contract law to permit the First Nations unilaterally to withdraw from the 1977 settlement without the concurrence of the PFRA.

Issue 5: Aboriginal, Treaty, and Riparian Water Rights

It is unnecessary for the Commission to address the nature and extent of the First Nations' aboriginal, treaty, and riparian water rights in light of our findings in relation to the first four issues. Nevertheless, to the extent that the interference with such water rights constitutes an alternative cause of action, and if the PFRA and its successors can be shown to have interfered with the First Nations' water rights, we consider the First Nations to be entitled to claim compensation for the damages caused by such interference. Due regard must be had, of course, for compensation already paid to the First Nations to avoid any element of "double counting."

The evidence before the Commission is insufficient to link pollution in the Qu'Appelle River conclusively to the construction and use of the Echo Lake, Crooked Lake, and Round Lake control structures. Similarly, we have been shown no evidence that the failure by Canada to license the First Nations' consumptive rights under the *North-West Irrigation Act* of 1894 has caused any damage to the First Nations. The Commission therefore declines the invitation to decide whether the First Nations' riparian or other water rights were extinguished by that statute, or whether the Crown failed to protect those rights.

RECOMMENDATIONS

Having found that the Government of Canada owes an outstanding lawful obligation to the First Nations of the Qu'Appelle Valley Indian Development Authority with respect to the Prairie Farm Rehabilitation Administration's acquisition of the right to use and occupy their reserve lands for flooding purposes, we therefore recommend:

RECOMMENDATION 1

That Canada immediately commence negotiations with the QVIDA First Nations to acquire by surrender or expropriation such interests in land as may be required for the ongoing operation of the control structures at Echo Lake, Crooked Lake, and Round Lake or, alternatively, remove the control structures.

RECOMMENDATION 2

That the flooding claims of the Sakimay, Cowessess, and Ochapowace First Nations be accepted for negotiation under Canada's Specific Claims Policy with respect to

(a) damages caused to reserve lands since the original construction of the dams in the early 1940s, and

(b) compensation for

  (i) the value of any interest that Canada may acquire in the reserve lands, and
  (ii) future damages to reserve lands,

subject to set-off of compensation of $3270 paid to those First Nations in 1943.

RECOMMENDATION 3

That the flooding claims of the Muscowpetung, Pasqua, and Standing Buffalo First Nations be accepted for negotiation under Canada's Specific Claims Policy with respect to

(a) damages caused to reserve lands

  (i) since the original construction of the dams in the early 1940s, or
  (ii) alternatively, since 1977, if these First Nations can be bound by the 1977 Band Council Resolutions and if the release for damages prior to 1977 can be severed from the invalid part of the settlement, and

(b) compensation for

  (i) the value of any interest that Canada may acquire in the reserve lands, and
  (ii) future damages to reserve lands,

subject to set-off of compensation of $265,000 paid to those First Nations in 1977.

FOR THE INDIAN CLAIMS COMMISSION

P.E. James Prentice, QC Commission Co-Chair	Carole T. Corcoran Commissioner	Roger J. Augustine Commissioner

Dated this 19th day of February, 1998

APPENDIX A

QU'APPELLE VALLEY INDIAN DEVELOPMENT AUTHORITY INQUIRY FLOODING CLAIM

1 Planning conferences

Regina, January 30, 1995
Regina, June 6, 1995
Regina, September 28, 1995
Regina, April 3, 1996
Regina, May 14, 1996
Regina, February 28, 1997

2 Community sessions

The Commission conducted the following community sessions:

- *September 18, 1996*: The Commission held a joint community session of the Sakimay, Cowessess, Kahkewistahaw, and Ochapowace First Nations in the Community Hall on the Sakimay reserve. Testifying were elders George Ponicappo, Alex Wolfe, Marie Kaye, Raymond Acoose, Edna Sangwais, Emma Panipekeesick, Jimmy Wahpooseywan, and Leonard Kequahtooway of Sakimay; Joseph Crowe, John Alexson, Mervin Bob, Allan McKay, and Urbin Louison of Kahkewistahaw; Henry Delorme of Cowessess; and Margaret Bear, Marlowe Kenny, Arthur George, and Calvin George of Ochapowace.
- *October 2, 1996*: The second session involved testimony from elders of the Pasqua First Nation who were heard in the Pasqua Band Hall. The participants included David Obey, Stanley Pasqua, Clara Pasqua, Andrew Gordon, Raymond Gordon, Clayton Cyr, Lawrence Stevenson, Jimmy Iron Eagle, George Kahnapace, Lawrence Chicoose, Agnes Cyr, Dora B. Stevenson, Marsha Gordon, Bernard Gordon, Edith Merrifield, and Ina Kahnapace.
- *October 3, 1996*: The Commissioners convened in the Muscowpetung School gymnasium to hear the evidence of 11 elders of the Mus-

cowpetung First Nation: Calvin Poitras Sr, Violet Keepness, Isabelle Keepness, William Pratt, Evelyn Cappo, Winonah Toto, Ervin Toto, Earl Cappo, Paul Poitras, Norma Cappo, and Eugene Anaquod.

- *April 4, 1997*: The final community session was held at the Standing Buffalo Cultural Centre to hear from that First Nation's elders. Providing oral testimony were Charlie Buffalo, Susan Yuzicappi, Isabelle Jackson, Felix Bearshield, Ken Goodwill, Clifford Goodwill, Tony Yuzicappi, and, through Band Councillor Velma Bear, Cecil Wajunta, Victor Redman, Catherine Goodfeather, and Celina Wajunta.

3 Legal argument Regina, June 26, 1997

4 Content of formal record

The formal record for the QVIDA Inquiry consists of the following materials:

- the documentary record (6 volumes of documents)
- 35 exhibits tendered during the inquiry, including transcripts from community sessions (4 volumes)
- transcript of oral submissions (1 volume)
- written submissions of counsel for Canada and the QVIDA First Nations, including authorities submitted by counsel with their written submissions and supplemental authorities submitted during oral submissions

The report of the Commission and letters of transmittal to the parties will complete the formal record of this inquiry.

THE COMMISSIONERS

Roger J. Augustine is a Micmac born at Eel Ground, New Brunswick, where he served as Chief from 1980 to 1996. He was president of the Union of NB-PEI First Nations from 1988 to January 1994. He is president of Black Eagle Management Enterprises and a member of the Management Board of Eagle Forest Products. He has been honoured for his efforts in founding and fostering both the Eel Ground Drug and Alcohol Education Centre and the Native Alcohol and Drug Abuse Rehabilitation Association. In February 1996, Mr Augustine was appointed a director to the National Aboriginal Economic Development Board. In June 1996, he was named Miramichi Achiever of the Year by the Miramichi Regional Development Corporation. He was appointed a Commissioner of the Indian Claims Commission in 1992.

Daniel J. Bellegarde, Co-Chair, is an Assiniboine/Cree from the Little Black Bear First Nation in southern Saskatchewan. From 1981 to 1984, Mr Bellegarde worked with the Meadow Lake District Chiefs Joint Venture as a socio-economic planner. He was president of the Saskatchewan Indian Institute of Technologies from 1984 to 1987. In 1988, he was elected First Vice-Chief of the Federation of Saskatchewan Indian Nations, a position he held until 1997. He is now a management and governance consultant. Mr Bellegarde was appointed Commissioner, then Co-Chair of the Indian Claims Commission on July 27, 1992, and April 19, 1994, respectively.

Carole T. Corcoran is a Dene from the Fort Nelson Indian Band in northern British Columbia. Mrs Corcoran is a lawyer with extensive experience in Aboriginal government and politics at local, regional, and provincial levels. She served as a Commissioner on the Royal Commission on Canada's Future in 1990/91, and as Commissioner to the British Columbia Treaty Commission from 1993 to 1995. Mrs Corcoran was appointed a Commissioner of the Indian Claims Commission in July 1992.

P.E. James Prentice, QC, Co-Chair, is a lawyer with the Calgary law firm Rooney Prentice. He has an extensive background in native land claims, including work as legal counsel and negotiator for the Province of Alberta in the tripartite negotiations that brought about the Sturgeon Lake Indian Claim Settlement of 1989. Mr Prentice is a member of the Canadian Bar Association, and was appointed Queen's Counsel in 1992. He was appointed Commissioner, then Co-Chair, of the Indian Claims Commission on July 27, 1992 and April 19, 1994, respectively.